Working Draft 830 CMR 63.32B.1: Combined Reporting

Attached is a working draft regulation on newly-enacted General Laws, chapter 63, § 32B, the Massachusetts combined reporting law, for public and practitioner comment. Please e-mail any comments on the draft regulation no later than December 5, 2008 to the following address: RulesandRegs@dor.state.ma.us

WORKING DRAFT FOR PRACTITIONER AND PUBLIC COMMENT - 11/6/08

83 CMR: DEPARTMENT OF REVENUE

830 CMR 63.00: TAXATION OF CORPORTIONS

830 CMR 63.32B.1: *COMBINED REPORTING*

(1) Purpose; General Rule; Outline

(a) Purpose. The purpose of this regulation is to provide rules for the combined reporting of income as required by G.L. c. 63, § 32B. The § 32B reporting requirement recognizes that a unitary business can be conducted not only through separate divisions of a single corporation but also through corporations related by common ownership such that in either instance it is appropriate and constitutionally permissible to apportion the resulting income of the unitary business even if that income arises from activities conducted outside the state. A combined report is a computational schedule that is generally required to be filed when a corporation that is subject to tax under chapter 63 is engaged in a unitary business with one or more corporations that are required to be included in a combined report under G.L. c. 63, § 32B. In such cases, the combined report is required to calculate the corporation's taxable net income derived from the unitary business as its share, attributable to the commonwealth, of the apportionable income or loss of the combined group engaged in the unitary business.

(b) General rule. In general, a corporation is required to file a combined report when it is subject to tax under chapter 63 and is engaged in a unitary business with one or more corporations that are required to be included in a combined report pursuant to G.L. c. 63, § 32B. In such cases, the taxpayer shall calculate its taxable net income derived from the unitary business as its share, attributable to the commonwealth, of the apportionable income or loss of the combined group engaged in the unitary business, determined in accordance with such combined report. The combined report shall be filed with the taxpayer's tax return, as further explained herein, and shall include the income and apportionment information of all corporations that are members of the combined group and such other information as required by the Commissioner. The manner of computation of the taxpayer's income and its apportionment formula are explained by this regulation. In addition, this regulation explains which taxpayer corporations are excluded from the requirement that they file or be included in a combined report and the requirements that relate thereto. In some cases a taxpayer may make an election to treat as its combined group all corporations that are members of its Massachusetts affiliated group, as defined hereunder, on such terms and in keeping with such requirements as are

further explained by this regulation. The requirement to file a combined report is *not* dependent upon an evidentiary showing that there is a distortion of income between corporations that are related by common ownership or that there is a lack of arm's length pricing in transactions between such corporations.

(c) Relationship to other rules.

1. Application of combined reporting. The corporations that are included in a combined group, including the taxable member or members of such group, generally retain their separate identities under chapter 63 for purposes of determining the state tax to be applied to the taxable members' apportioned share of the combined group's taxable income. Consequently, in determining the tax to be applied to such taxable income, the rules of chapter 63 generally apply to determine the computation of the combined group's taxable income and the apportionment formulas of the taxable members of the group, subject to modifications as referenced herein, as well as the rate of tax to be applied to a taxable member's apportioned income derived from the group.

2. Continued general application of chapter 63. The combined reporting requirement does not disregard the separate identity of an individual taxable member of a combined group for purposes of chapter 63 generally. Therefore, a taxable member may have tax attributes or consequences apart from those determined through the means of a combined report. For example, in any case where no affiliated group election is made, a taxable member of a combined group may have, in addition to its apportionable share of the combined group's unitary business income, allocable or apportionable income from activities that were conducted by the taxpayer and not as part of the combined group's unitary business. In these cases, the taxpayer corporation shall be subject to tax on such other income under the general rules as set forth in chapter 63.

3. Application of non-income measure. The combined reporting rules provide a method for determining the apportioned taxable net income derived by a taxable member of a combined group from the group's unitary business activities (or affiliated group activities in the instance of an affiliated group election). These rules do not dispense with the requirement that certain corporations are required to pay the non-income measure of the corporate excise as determined under G.L. c. 63, § 39. A member of a combined group that is subject to the non-income measure must separately calculate that measure under the rules that apply thereto. In some instances payment of the non-income measure is required even when a corporation is not subject to tax on its income either through the means of a combined report or otherwise.

4. Revocation of election under prior G.L. c. 63, § 32B. Pursuant to the enactment of G.L. c. 63, § 32B by St. 2008, c. 173, the prior version of § 32B has been repealed. Therefore, any taxpayer election that was made pursuant to prior § 32B and the regulation that construed that repealed statutory section, prior 830

CMR 63.32B.1, is revoked for tax years beginning on or after January 1, 2009 and any such prior election shall have no further effect.

(d) Outline. 830 CMR 63.32B.1 is organized as follows.

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(2) Definitions

"*Affiliated group election*," an election by a taxpayer member on behalf of it and its affiliates to treat as its combined group all corporations that are members of its Massachusetts affiliated group, on such terms and in keeping with such requirements as are further explained by this regulation and such forms or other notices as are issued by the Department.

"*Affiliated group income*," the aggregate taxable net income or loss of the group members of a Massachusetts affiliated group for a taxable year in which an affiliated group election is in effect, which is to be apportioned to the members of the group pursuant to the affiliated group election made by such group, whether in the absence of the application of the affiliated group election some or all of such income would have been allocable to a particular state or apportionable.

"*Code*," the Internal Revenue Code as amended and in effect for the taxable year.

"*Combined group*," a group of two or more corporations related by common ownership including one or more corporations that are subject to tax on their income under G.L. c. 63, § 2, 2B, 32D, 39 or 52A that are required to be included in a combined report pursuant to G.L. c. 63, § 32B, as enacted by St. 2008, c. 173, because the corporations are engaged in a unitary business. A combined group specifically includes or excludes certain corporations as described at 830 CMR 63.32B.1(4). The parameters of a combined group will depend upon whether the taxable members of the combined group elect to determine the combined group's taxable income on a water's edge or worldwide basis. In the case of an affiliated group election, the term "combined group" refers to the

Massachusetts affiliated group to which the election applies.

"*Combined group's taxable income*," the aggregate taxable net income or loss, subject to apportionment and derived from a unitary business or from an affiliated group in the case of an affiliated group election and reported on a combined report of every taxable member and non-taxable member of the combined group.

"*Combined report*," a schedule or schedules, as required by G.L. c. 63, § 32B, as enacted by St. 2008, c. 173, and this regulation or such other rules as the Commissioner may establish, which are to be attached to a taxpayer's tax return and that report the income and apportionment information of all corporations that are members of the taxpayer's combined group, as well as any supporting information, as required by the Commissioner.

"*Commissioner*," the Commissioner of the Massachusetts Department of Revenue or the Commissioner's duly authorized representative.

"*Commonly owned" or "common ownership*," where more than 50 percent of the voting control of one or more corporations or other entities, as applicable in the context, is directly or indirectly owned by one or more common owners, whether corporate or non-corporate. When evaluating the existence of a combined group, it is irrelevant whether a common owner or owners are members of the combined group.

"*Consolidated return*," a return of income filed with the federal government by an affiliated group as determined under the Code pursuant to Code § 1501.

"*Corporation*," a business corporation within the meaning of G.L. c. 63, § 30, whether or not organized in Massachusetts. For taxable years beginning prior to January 1, 2009, a "corporation" refers to either a foreign or domestic business corporation, utility corporation, financial institution, or insurance company, depending upon the context, as determined under the pertinent provisions of chapter 63 in effect for such years.

"*Credit*," any tax credit that a corporation may apply against its excise under the pertinent provisions of G.L. c. 63.

"*Disregarded entity*," a disregarded entity within the meaning of G.L. c. 63, § 30.

"*Federal consolidated group*," an affiliated group that has filed a consolidated return of income under Code § 1501.

"*Massachusetts affiliated group*," an affiliated group as defined in section 1504 of the Code except that it shall include all corporations incorporated in the United States or formed under the laws of the United States, any state, the District of Columbia or any territory or possession of the United States that are commonly owned, directly or indirectly, by any member of such affiliated group and any other commonly owned corporation that meets either of the two following standards: (i) a corporation that,

regardless of the place of its incorporation or formation, has property, payroll, and sales factors within the United States that average 20 per cent or more or (ii) a corporation that earns more than 20 per cent of its income, directly or indirectly, from intangible property or service-related activities, the costs of which generally are deductible for federal income tax purposes, whether currently or over a period of time, against the business income of other members of the group. In the case of a corporation referenced in (ii), the income and apportionment factors of such corporation are taken into account in the Massachusetts affiliated group only to the extent of the income referenced in (ii) and the apportionment factors that relate to that income.

"*Net operating loss*," a net operating loss within the meaning of G.L. c. 63, § 30.5.

"*Non-taxable member*," a member of a combined group that is not subject to tax on its income under G.L. c. 63, § 2, 2B, 32D, 39 or 52A. A non-taxable member that is not subject to income tax under said sections may nonetheless be subject to the non-income measure of the corporate excise as determined under G.L. c. 63, § 39.

"*Partnership*," a partnership within the meaning of G.L. c. 63, § 30.

"*Principal reporting corporation*," the taxable member of a combined group that reports the income of the combined group and otherwise acts as the agent of the members of the group, as further described at 830 CMR 63.32B.1(11).

"*Taxable member*," a member of a combined group that is subject to tax on its income under G.L. c. 63, § 2, 2B, 32D, 39 or 52A, other than a corporation described in G.L. c. 63, § 38Y.

"*Unitary business*," a group of two or more corporations related by common ownership that are sufficiently interdependent, integrated or interrelated through their activities so as to provide mutual benefit and produce a significant sharing or exchange of value among them or a significant flow of value between the separate parts. This sharing, exchange or flow of value to a corporation located in this state provides the constitutional basis to apportion the resulting income of the unitary business even if that income arises from activities conducted outside the state. The term unitary business shall be construed to the broadest extent permitted under the constitution of the United States. For purposes of this definition, any business conducted by a partnership shall be treated as the business of the partners, whether the partnership interest is directly held or indirectly held through a series of partnerships, to the extent of the partner's distributive share of the partnership's income, regardless of the magnitude of the partner's ownership interest or its distributive share of partnership income. Moreover, a business conducted directly or indirectly by one corporation is unitary with that portion of a business conducted by another, commonly-owned corporation through its direct or indirect interest in a partnership if the activities conducted by the former corporation and the partnership are unitary within the meaning of this definition regardless of the magnitude of the partner's ownership interest or its distributive or any other share of partnership income. A group of corporations related by common ownership may be engaged in more than one unitary business. Though not the

focus of this regulation, a unitary business can also be a single economic enterprise that is made up of separate parts of a single business entity, and thus is not necessarily an enterprise that is conducted by corporations related by common ownership.

(3) Unitary presumptions and inferences.

(a) General. Without limiting the scope of a unitary business, the following provisions set forth certain presumptions and inferences concerning whether and when two or more corporations under common ownership will be deemed to be engaged in a unitary business. These provisions do not purport to set forth all of the indicia of a unitary business, as that determination is to be made pursuant to U.S. constitutional principles.

(b) Likely unitary situations. Without limiting the scope of a unitary business as determined in other situations, business activities conducted by corporations under common ownership that are in the same general line of business, such as a multistate grocery chain, will generally constitute a unitary business. Business activities conducted by corporations under common ownership that comprise different steps in a vertically structured business will almost always constitute a unitary business. For example, a business engaged in the exploration, development, extraction, and processing of a natural resource and the subsequent sale of a product based upon the extracted natural resource, is engaged in a single unitary business.

(c) Newly-acquired and newly-formed entities. In the tax year in which the common ownership standard is first met by reason of one of the transactions described in this subsection (c) below, the rebuttable presumptions stated in this subsection shall apply. These presumptions may be rebutted by the taxpayer or the Commissioner by the presentation of clear and cogent evidence showing that the corporations in question either are, or are not, engaged in a unitary business, as the case may be.

1. Where a voting interest is directly or indirectly acquired by or in a taxpayer, or by or in a member of a taxpayer's combined group, that results in achieving for the first time common ownership, it shall be presumed that the acquiring and acquired corporations are not engaged in a unitary business for purposes of the tax reporting period of the combined reporting group that includes the acquisition. This presumption against unity shall not apply where the combined group and the acquired corporation were previously engaged in the relationship described in 830 CMR 63.32B.1(3)(b) apart from meeting the common ownership standard.

2. Where a taxpayer, or one or more members of the taxpayer’s combined group, forms a new corporation it shall be presumed that the formed corporation(s) is engaged in a unitary business with the forming corporation(s) from the date of its formation.

(d) Passive holding companies. A passive parent holding company that directly or indirectly controls one or more operating company subsidiaries engaged in a unitary business shall be deemed to be engaged in a unitary business and includable in a

combined report with the subsidiary or subsidiaries. An intermediate passive holding company shall be deemed to be engaged in a unitary business with the parent and subsidiary or subsidiaries and includable in a combined report with them.

(e) Sharing of intellectual property; intercompany financing. Transfers or sharing of technical information or intellectual property, such as patents, copyrights, trademarks and service marks, trade secrets, processes or formulas, know-how, research, or development, provide evidence of a unitary relationship when the information or property transferred or shared is significant to the businesses' operations. Similarly, a unitary relationship is indicated when there is significant common or intercompany financing, including the guarantee by, or the pledging of the credit of, one or more business entities for the benefit of another business entity or entities, if the financing activity serves an operational purpose.

(f) Relevance of market-based or "arm's length" pricing where intercompany transactions. One indicia of a unitary business conducted between corporations related by common ownership is sales, exchanges, or transfers of products, services and/or intangibles between such corporations. When such evidence exists this evidence is not negated by the use of market-based or "arm's length" pricing as to the transactions by the corporations in question.

(4) Corporations to be included in a combined report

(a) General. In general, where a corporation subject to tax under G.L. c. 63, § 2, 2B, 32D, 39 or 52A, is engaged in a unitary business with one or more other corporations that are related by common ownership, the taxpayer corporation must determine its tax liability based upon the income and apportionment information of such other corporations included in the combined group through the means of a combined report. In some cases, the taxable member or members of a combined group may make an election to treat their Massachusetts affiliated group as the combined group and to file a combined report on that basis. Irrespective as to whether an affiliated group election is made, not every type of corporation is required to be included in a combined group and therefore to have its tax attributes included in a combined report. The rules for included and excluded corporations are set forth below.

(b) Included corporations. Corporations that are required to be included in a combined group and therefore required to be included in a combined report filed by a taxable member of a combined group shall include all entities of the kind that are subject to tax or would be subject to tax if doing business in the commonwealth, under G.L. c. 63, § 2, 2B, 32D, 39 or 52A, and entities described in G.L. c. 63, §§ 20 to 29E, inclusive, if the entity in question does not qualify for treatment as a life insurance company as defined in section 816 of the Code or an insurance company subject to tax imposed by section 831 of the Code. Each such corporation is included in a combined group and the resulting combined report filing, as stated, irrespective of whether the corporation is actually subject to tax under G.L. c. 63, § 2, 2B, 32D, 39 or 52A. Consequently, for example, an S corporation is subject to tax under G.L. c. 63, § 32D and included in a combined group

irrespective as to whether in any given year it actually has a tax liability under § 32D. Also, the corporations to be included in a combined group include a real estate investment trust (REIT) as referenced under sections 856 to 859, inclusive, of the Code and a regulated investment company (RIC) as referenced under sections 851 to 855, inclusive, of the Code. However, a corporation is only required to be included in a combined group with one or more other corporations if, *inter alia*, it is related with such corporations by common ownership. Therefore, for example, in many cases the ownership of a REIT or a RIC may not meet this standard.

(c) Excluded corporations. Corporations that are not included in a combined group and therefore not included in a combined report filed thereby, irrespective as to whether they are engaged in a unitary business with a taxable member of such group, include an entity described in G.L. c. 63, § 38B or 38Y. Also, such excluded corporations include an entity described in G.L. c. 63, §§ 20 to 29E, inclusive, except as provided in 830 CMR 830.32B.1(4)(b) above or as otherwise provided in chapter 63.

(5) Water's edge or worldwide parameters of combined report

(a) General rule. The taxable members of a combined group engaged in a unitary business may elect to determine their apportioned share of the aggregate taxable net income or loss derived from the unitary business pursuant to a worldwide election under which each taxable member shall take into account the income and apportionment factors of all the members, wherever located, includible in the combined group. However, if the taxable members of a combined group do not make this election, each member shall determine its apportioned share of such income on a water's edge basis as determined under 830 CMR 63.32B.1(5)(b). The mechanics for making a worldwide election are set forth in 830 CMR 63.32B.1(5)(c).

(b) Water's edge determination. If the taxable members of a combined group do not make a worldwide election, each member shall determine its share of the aggregate taxable net income or loss of the combined group on a water's edge basis under which each member shall take into account the income and apportionment information of only the members that are described in any one or more of the following categories:

(i) any member incorporated in the United States or formed under the laws of the United States, any state, the District of Columbia or any territory or possession of the United States;

(ii) any member, regardless of the place of incorporation or formation, if the average of its property, payroll, and sales factors within the United States is 20 per cent or more;

(iii) any member that earns more than 20 per cent of its income, directly or indirectly, from intangible property or service-related activities, the costs of which generally are deductible for federal income tax purposes, whether currently or over a period of time, against the business income of other members of the group,

but only to the extent of that income and the apportionment factors related thereto.

For purposes of 63.32B.1(5)(b)(iii), examples of income from intangible property or service-related activities shall include, without limitation, royalty income from the license of trademarks, patents, or other intellectual property, interest and other income from lending money, and income from management services. The following example illustrates the application of 830 CMR 63.32B.1(5)(b)(iii). A corporation, L, is formed under the laws of a non-U.S. jurisdiction, i.e., it is not incorporated or otherwise formed under U.S. laws as referenced in 830 CMR 63.32B.1(5)(b)(i), and the average of its property, payroll and sales factors within the U.S. is not 20 per cent or more, i.e., within the meaning of 63.32B.1(5)(b)(ii). L is engaged in lending activity with two corporations formed under U.S. law, M, a corporation that is subject to Massachusetts tax, and N, a corporation that is not subject to Massachusetts tax. L, M and N are related by common ownership. L's lending activities fund M and N's business activities and the three corporations are engaged in a unitary business. L derives more than 20% of its income from its lending activities with M and N. M and N deduct the interest and other related costs of this lending activity on their federal consolidated return. L is included in a "water's edge" combined group with M and N to the extent of the income and apportionment factors that derive from, and relate to, its lending activities with M and N. In the case of an affiliated group election, L is included in a Massachusetts affiliated group with M and N to the extent of the income and apportionment factors that derive from, and relate to, its lending activities with M and N, irrespective as to whether L is engaged in a unitary business with M and N. *See* 830 CMR 63.32B.1(10)(c).

(c) Worldwide election.

1. Mechanics for making the election. A worldwide election shall be made by the principal reporting corporation of the combined group. The election shall be on an original, timely filed return or as otherwise required in writing by the Commissioner. A return shall be considered timely if it is filed on or before the earliest due date or extended due date for the filing of the principal reporting corporation's return under chapter 63. No return filed after this date, whether filed with an application for abatement or otherwise, shall constitute a valid worldwide election. The election, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the combined group has agreed to be bound by such election.

2. Effect of election in subsequent tax years. A worldwide election shall be binding for and applicable to the taxable year for which it is made and for the next 9 taxable years. Any corporation entering the unitary group after the year of the election shall be deemed to have consented to the application of the election and to have waived any objection thereto.

3. Revocation, renewal of election. A worldwide election, once made, cannot be revoked until after the passage of 10 taxable years. When an election is made it may be renewed after 10 taxable years for another 10 taxable years. The

revocation or renewal of an election shall be made on an original, timely filed return by the combined group's principal reporting corporation or as otherwise required in writing by the Commissioner. A revocation or a renewal shall be for the first taxable year after the completion of a 10-year period in which an election was in place. Any revocation or renewal, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the combined group has agreed to be bound by such revocation or renewal. If a prior worldwide election is neither affirmatively revoked nor renewed after 10 taxable years pursuant to the terms of this section, the election shall terminate for the subsequent taxable year, but may be renewed for any 10-year period thereafter by election on the terms set forth herein.

4. Interaction with affiliated group election. A taxpayer may not make a worldwide election and an affiliated group election for the same taxable year and may not make a worldwide election for any year in which an affiliated group election is in effect. *See* 830 CMR 63.32B.1(10).

5. Agreement to provide documents**.** An election under this section shall constitute consent to the production of documents or other information that the Commissioner reasonably requires -- for example, for purposes of verifying the appropriate members of the combined group, that the requirements of the worldwide election have been met, that the tax computation and tax reporting are proper, etc. The documents shall be provided in language and form acceptable to the Commissioner.

(6) Determination of taxable income of taxable member of a combined group

(a) General rule. A corporation subject to tax under G.L. c. 63, § 2, 2B, 32D, 39 or 52A and included in a combined group with one or more other corporations shall file with its tax return a combined report that includes the income and apportionment information of all corporations that are members of the combined group and such other information as required by the Commissioner. This taxable member of the combined group shall determine its net income derived from the activities of the combined group by applying its apportionment percentage as determined under 830 CMR 63.32B.1(7) to the combined group's taxable income as determined under 830 CMR 63.32B.1(6)(c) below.

(b) Components of income of taxable members of a combined group.

1. Unitary group members. A taxable member's share of the unitary business income apportionable to this state of each combined group of which it is a member shall be determined by reference to a combined report filed with respect to the unitary business. The use of the combined report does not disregard the separate identities of the taxable members of the combined group. Each taxable member of a combined group engaged in a unitary business is responsible for an income-based excise that is to be determined based upon its taxable income or loss apportioned or allocated to this state, which shall include, as relevant, the

taxpayer's: (i) share of any unitary business income apportionable to this state for each of the combined groups of which it is a member; (ii) share of any income apportionable to this state of a distinct business activity conducted within and without the state by the taxable member and not as a part of the unitary business referenced in (i); (iii) income from a business conducted by the taxable member entirely within the state and not as a part of the unitary business referenced in (i); (iv) income or loss allocable to this State; and (v) net operating loss carry forward(s), including any NOL carry forward(s) of another taxable member of the combined group that the taxpayer is permitted to share, to be offset against the taxpayer's taxable net income on a post-apportioned basis as explained in 830 CMR 63.32B.1(8). Depending upon the circumstances of any individual taxpayer, without limitation as to other possible adjustments, other items of income or adjustments to the taxpayer's apportioned net income may also apply.

2. Massachusetts affiliated group members. In the case of an affiliated group election, each taxable member of the combined group is responsible for an income-based excise that is to be determined based upon its taxable income or loss apportioned to this state, which shall be its apportioned share of the combined group's affiliated group income prior to any post-apportionment adjustments, including the application of any NOL carry forwards, *see* 830 CMR 63.32B.1(8).

3. Relationship to non-income measure. The combined reporting rules provide a method for determining the apportioned taxable net income derived by a taxable member of a combined group from the group's unitary business activities, or from the affiliated group's activities in the instance of an affiliated group election. However, a member of a combined group that is subject to G.L. c. 63, § 39, whether or not taxable on its income under chapter 63, shall also be separately responsible for a non-income-based excise as determined under § 39. The non-income measure is computed as it was prior to the adoption of § 32B and so, for example, a corporation subject to this measure may be required to compute a stand-alone apportionment percentage for purposes of a net worth calculation.

(c) Rules to determine combined group's taxable income. The combined group's taxable income shall be determined by applying the following rules.

1. In the case of a combined group taxable with respect to its unitary business, from the total income of the combined group, subtract any income, and add any expense or loss, other than the unitary business income, expense or loss of the combined group. In the case a combined group that has made an affiliated group election, no subtractions or additions are necessary.

2. Except as otherwise provided, the total income of the combined group is the sum of the incomes, separately determined, of each member of the combined group. The separate income of each member of the combined group shall be determined as follows:

a. For any member incorporated in the United States, or included in a consolidated federal corporate income tax return, the income to be included in the total income of the combined group shall be the taxable income for the corporation as determined under chapter 63, subject to any further adjustments as required by this regulation.

b(i). For any member not incorporated in the United States, or included in a consolidated federal corporate income tax return, the income to be included in the total income of the combined group shall be determined from a profit and loss statement that shall be prepared for each foreign branch or corporation in the currency in which its books of account are regularly maintained, adjusted to conform it to the accounting principles generally accepted in the United States for the preparation of such statements. The profit and loss statement of each member of the combined group, and the apportionment factors related thereto, whether United States or foreign, shall be translated into the currency in which the parent company maintains its books and records on any reasonable basis consistently applied on a year-to-year and entity-by-entity basis. Income apportioned to this state shall be expressed in United States dollars.

(ii) In lieu of the procedures set forth in 830 CMR 63.32B.1(6)(c)2.b(i), above, and subject to the determination of the Commissioner that it reasonably approximates income as determined under chapter 63, any member not included in 830 CMR 63.32B.1(6)(c)2.a, above, may determine its income on the basis of any other reasonable method consistently applied on a year-to-year and entity-by-entity basis.

3. If the unitary business includes income from a partnership, the income to be included in the total income of the combined group shall be the combined group member's direct and indirect distributive share of the partnership's unitary business income. Where an affiliated group election has been made and the income of the combined group includes income from a partnership, the income to be included in the total income of the combined group shall be the combined group member’s direct and indirect distributive share of the partnership’s aggregate income.

4. Subject to the exceptions referenced below, dividends paid by one combined group member to another combined group member shall, to the extent those dividends are paid out of the earnings and profits of the unitary business included in the combined report, from the current or an earlier year, be eliminated from the income of the recipient. Where a member has earnings and profits from the unitary business and also has earnings and profits from activities that were not a part of the unitary business and therefore not included in a combined report and pays out dividends, the dividends will be deemed to be paid out of earnings and profits on a last in first out basis as between taxable years and on a pro rata basis with respect to an individual taxable year, provided, however, that this rule does

not apply where such member has untaxed earnings and profits from its prior activities as a Massachusetts corporate trust (MCT) or from a predecessor or other entity that was a MCT. Where a combined group member has untaxed MCT earnings and profits, as referenced in the preceding sentence, such dividends are not eliminated and it shall be presumed that any dividends paid by such member are first paid out of the untaxed MCT earnings and profits. In general, where a member of a combined group receives a dividend from another member of a combined group that is not paid out of the earnings and profits of the unitary business, a dividends received deduction, typically 95%, *see* G.L. c. 63, §§ 1 and 38(a)(1), may apply to offset against the taxpayer's post apportioned income (i.e., the dividends received deduction is not applied in determining the combined group's taxable income). However, there is no dividends received deduction that applies where (a) a member of a combined group member has untaxed MCT earnings and profits as referenced above and pays a dividend with respect to these untaxed MCT earnings and profits, or (b) a member of a combined group that is not an 80% owned utility corporation pays a dividend to a utility corporation (however, where the payee is an 80% owned utility corporation and pays a dividend to another utility corporation there is a 100% dividends received deduction), *see* G.L. c. 63, § 52A(b). The provisions in this section similarly apply to a combined group where an affiliated group election has been made except that in such cases the references in this section to the earnings and profits of a unitary business included in a combined report are instead to the earnings and profits derived from all activities of the Massachusetts affiliated group, business or otherwise, as included in a combined report.

5. Income from an intercompany transaction between members of the same combined group that relate to the unitary business of the group, or income from intercompany transactions in the case of an affiliated group election without regard to any unitary determination, shall be deferred in a manner similar to 26 CFR 1.1502-13. Upon the occurrence of any of the following events, deferred income resulting from an intercompany transaction between members of a combined group shall be restored to the income of the seller and shall be apportioned as income earned immediately before the event, as unitary business income where no affiliated group election has been made and as affiliated group income where an affiliated group election is in effect at the time of the intercompany transaction:

a. the object of a deferred intercompany transaction is re-sold or otherwise disposed of by the buyer to an entity that is not a member of the combined group;

b. where the combined group is based upon the existence of a unitary business (i.e., no affiliated group election has been made), the object of a deferred intercompany transaction is:

(i) re-sold by the buyer to an entity that is a member of the combined group for use outside the unitary business in which the buyer and seller are engaged; or

(ii) converted by the buyer to a use outside the unitary business in which the buyer and seller are engaged; or

c. the buyer and seller are no longer members of the same combined group (including where a combined group ceases to be determined pursuant to a pre-exiting affiliated group or worldwide election and the buyer and seller are no longer in a combined group for that reason).

Apart from the specific rules set forth above, the Commissioner will generally apply the principles set forth in 26 CFR 1502-13 as to intercompany transactions to the extent consistent with state combined group membership and reporting principles in general and state law as set forth in G.L. c. 63, § 32B and G.L. c. 63.

6. A charitable expense incurred by a member of a combined group shall, to the extent allowable as a deduction pursuant to Code § 170, be subtracted first from the unitary business income of the combined group (subject to the income limitations of that section applied to the entire business income of the group), and any remaining amount shall then be treated as a carryover charitable expense allocable to the member that incurred the expense. Any charitable deduction disallowed under the foregoing rule, but allowed as a carry over deduction in a subsequent year, shall be treated as originally incurred in the subsequent year by the same member, and the rules of this section shall apply in the subsequent year in determining the allowable deduction in that year. In any case where the combined group member that previously incurred a charitable expense ceases to be a member of the combined group, for whatever reason, the expense carry forward, if any, may only be applied by that member subject to the income limitations of Code § 170, and may no longer be applied by the combined group or any other group member thereof.

7. Any expense of one member of the unitary group which is directly or indirectly attributable to the allocable income of another member of the unitary group shall be allocated to that other member as corresponding allocable expense, as appropriate. However, this rule does not apply in the context of an affiliated group election because where an affiliated group election is made all allocable income is treated as apportionable income.

8. If one or more members of a combined group have a capital gain or loss derived from the sale of property used in the unitary business the group gains and losses are netted to determine whether there is a net gain to be taxed to the combined group for such year. If there is a net gain, such gain is included in the combined taxable income of the group that is subject to apportionment. However, if there is a net loss, the net loss is not deducted in determining the combined

group's taxable income. Further, if there is a net loss there is no carry forward of such loss. Where an affiliated group election is made the same rules apply, except that all the gains and losses that result from the sale or other disposition of a capital asset are netted, not merely those that result from a disposition of a capital asset used in the unitary business.

Except as otherwise stated, the rules set forth in this subsection apply to determine the combined group's taxable income that is to be apportioned to the taxable members of the combined group. After the apportioned Massachusetts income of the taxable members of the combined group has been determined there may be additional Massachusetts adjustments to such apportioned income that apply, including the application of any net operating loss carry forwards, see 830 CMR 63.32B.1(9).

(7) Apportionment of income computation

(a) General. A corporation subject to tax under chapter 63 and included in a combined group with one or more other corporations shall file with its tax return a combined report that includes the income and apportionment information of all corporations that are members of the combined group and such other information as required by the Commissioner. This taxable member of the combined group shall determine its net income derived from the activities of the combined group by applying its apportionment percentage as determined under this section to the combined group's taxable income as determined under 830 CMR 63.32B.1(6)(c). Subject to the rules set forth in this section, each member of a combined group shall separately determine its apportionment information pursuant to the apportionment provisions of chapter 63 that apply to such member. The apportionment method used by each such member depends on the classification of the individual member, e.g., whether the individual member is a manufacturing corporation, financial institution, utility corporation, mutual fund service corporation, etc. The apportionment provisions in this section shall only be applied to determine the apportionment of the unitary business income (or in the case of an affiliated group election, the affiliated group income) derived by a taxable member of a combined group from such group. Therefore, for example, these apportionment provisions do not apply to determine the non-income measure of a combined group member subject to tax under G.L. c. 63, § 39, which is to be separately determined by such member under § 39.

(b) Determination of factor numerators; sales factor "Finnigan" adjustment. The numerator of the apportionment factor or factors that apply to each taxable member of a combined group shall include the property, payroll, and sales/receipts, as applicable, of such member as sourced to Massachusetts under the rules provided under G.L. c. 63, § 2A, 38 or 42, as applicable, subject to any adjustments provided for in this section. For example, where a combined group includes one or more taxable members and one or more non-taxable members, the sales/receipts factor numerator(s) of the taxable member or members are increased in the following manner.

1. The total amount of sales or receipts sourced to Massachusetts under G.L. c. 63, § 2A, 38 or 42, as applicable, is determined for all non-taxable members;

2. Each taxable member determines a fraction, the numerator of which is the sales/receipts factor numerator of such member, determined without any adjustments under this subsection, and the denominator of which is the sum of the sales/receipts factor numerators of all taxable members, as determined without any adjustments under this subsection: and

3. For each taxable member, the total Massachusetts receipts of the non-taxable members is multiplied by the fraction described in step 2, and the resulting product is added to the sales factor numerator, as otherwise determined, of the taxable member.

(c) A**pplication of § 38(f) "throwback**." For purposes of determining whether sales are to be sourced to Massachusetts and included in the numerator of the sales factor of a taxable member of a combined group under G.L. § 38(f) (i.e., as "throw back" sales), such taxable member is considered taxable in any state in which any member of its combined group is subject to tax with respect to the income derived from the group's unitary business. This provision applies only if at least one member of the combined group is entitled to apportion its income under chapter 63 for the tax year in question.

(d) Determination of factor denominators. The denominator of the apportionment factor or factors that shall apply to each taxable member of a combined group shall include the property, payroll, and sales/receipts, regardless of location, of the combined group as a whole. The factors of the combined group as a whole are determined by adding together the denominators of all members of the combined group, as individually determined under the rules provided in G.L. c. 63, § 2A, 38 or 42, subject to any adjustments provided in this section. The denominators of the members of the combined group shall be individually determined under said rules that apply to such member, or under such rules that would apply to such member in the case of a non-taxable member assuming that such non-taxable member were subject to Massachusetts income tax. The denominators of the property and payroll factors of the combined group as a whole shall include the property and payroll factor denominators, determined under § 38, of a combined group member that either is to apply the single sales factor apportionment rules set forth under § 38 or that would be required to apply these rules if such member were subject to Massachusetts income tax.

(e) Inclusion of partnership factors. Where a taxable member of a combined group receives unitary business income through a direct or indirect ownership interest in a partnership or disregarded entity the property, payroll, and sales/receipts factors of such taxable member shall include its pro rata share of the factors relating to such income as attributed to the taxable member through such ownership interest. In the case of an affiliated group election, a taxable member of a combined group shall include in its property, payroll and sales/receipts factors its pro rata share of the property, payroll and sales/receipts factors relating to all income that is attributed to the taxable member

through its direct or indirect ownership interest in a partnership or disregarded entity.

(f) Exclusion of factors related to receipts excluded from federal gross income. Where gross receipts are excluded from the federal gross income of a combined group member, the gross receipts are similarly excluded from the numerator and denominator of the member's sales factor. Also, any property or payroll that relate to such receipts are similarly excluded from the property or payroll factors of the combined group member.

(g) Intercompany transactions. In determining the numerator and denominator of the apportionment factors of the members of a combined group, transactions between combined group members that relate to the unitary business are generally disregarded. Also, intercompany transactions between a combined group member and a partnership whose income is included in the unitary business of the combined group are also generally disregarded where the transactions relate to the unitary business. Where a taxable member of a combined group has made an affiliated group election, *all* transactions between the affiliated group members are generally disregarded. With respect to intercompany transactions the following specific rules apply.

1. Intercompany sales are disregarded for purpose of the sales/receipts factors.

2. A sale by a member of a combined group to a purchaser that is not a member of the combined group is attributed to the group member that books the sale, subject to the adjustments to be made under 830 CMR 63.32B.1(7)(b). However, the following rules shall apply to avoid distortion of applicable apportionment formulas in the case of intra-group sales involving manufactured products.

    a. Where a group member making an outside sale previously acquired the property or services sold from another combined group member, the activities of both the member producing the property or services and the member making the outside sale must be considered jointly for purposes of determining the appropriate apportionment formula of the member making the sale outside of the group. For example, where a combined group member (A) manufactures property and sells all of the manufactured property, directly or indirectly, to member (B), which, in turn, resells the property to a party outside the combined group, both the activities of A and the activities of B must be considered jointly to determine whether B must use the single sales factor apportionment applicable to manufacturers or the three-factor apportionment applicable to non-manufacturers. In this example, both A and B are considered to be engaged in manufacturing and the joint property, payroll, and receipts of A and B will be considered to determine whether the manufacturing activity attributed to B is substantial. For purposes of this determination, B's receipts from sales of property manufactured by A are considered to be manufacturing receipts. If the activities of A and B considered jointly involve substantial

manufacturing, as provided under G.L. c. 63, § 38, then B must use single sales factor apportionment.

b. To the extent that A sells its manufactured property both to B and to other buyers, the property, payroll, and receipts of B shall be combined with pro-rated property and payroll of A for purposes of determining whether B is engaged in substantial manufacturing. B's receipts from sales of property manufactured by A shall be considered to be manufacturing receipts of B. The property and payroll of A shall be pro-rated in the same ratio that A's sales to B bear to A's total sales.

c. Example 1. A unitary group is comprised of members A and B. Both A and B have nexus in Massachusetts. A manufactures widgets, which it sells to B. B sells the widgets to unrelated parties. A has $1000 of property, $150 of payroll and $300 of sales (to B). All of A's property, payroll, and receipts are attributable to manufacturing. B has $50 of property, $150 of payroll, and $500 of sales (of property purchased from A). For purposes of apportionment, A is a manufacturing corporation using single sales factor apportionment. However, as all of A's sales are to another group member, A has no applicable sales factor and none of the group's income is apportioned to A. A's activities and its property, payroll, and sales are considered together with those of B for purposes of determining whether B is a manufacturing corporation. Therefore, B is considered to be engaged in manufacturing and $1000/1050 of its property, $150/300, and $500/500 of its sales are attributable to manufacturing. Applying the provisions of G.L. c. 63, § 38(l), B's deemed manufacturing activity is substantial. B must apportion the group's combined income to Massachusetts using single sales factor apportionment. B's denominator is $500 and its numerator is the portion of the $500 attributable to Massachusetts customers.

d. Example 2. Same facts as in example one except that A has $1000 of sales, $300 of which are to B and $700 are to unrelated parties. B has $2000 of sales, $500 of which relate to goods purchased from A and $1500 relate to goods purchased from unrelated vendors and resold. A uses a single sales factor apportionment formula. Its sales factor denominator is $2700 and its numerator is the portion of its $700 in direct sales that are attributable to Massachusetts customers. B is also deemed to be engaged in substantial manufacturing because A's manufacturing activity is attributed to B and 25% (i.e. $500/2000) of its sales are manufacturing sales. B therefore also uses a single sales factor apportionment. B's denominator is $2700 and its numerator is the portion of its $2000 in sales that are attributable to Massachusetts customers.

e. Example 3. Same facts as example two except that only B has nexus in Massachusetts. B continues to use single sales factor apportionment. B's denominator remains $2700. B's numerator is the sum of its numerator in example 2 and A's numerator in example 2.

3. Intercompany leases of employees are disregarded for purposes of the payroll factor. Wages paid to an employee shall be attributed in the payroll factor of the group member for whom the employee is providing actual services. In the case of an employee performing services for more than one combined group member, the group shall reasonably allocate the wages of the employee among the members for whom actual services are provided.

4. Lease payments to a non-group member shall be attributed to the group member making actual use of the leased property, to the extent of such actual use. If tangible property owned by one group member is leased to another group member, the property shall be included both in the property factor of the owner at its original cost and in the property factor of the lessee, to the extent of actual use of the property by the lessee, in an amount equal to eight times the net annual rent, provided that the original cost amount used by the owner in the numerator or denominator of its property factor shall be reduced (but not below zero) by the dollar amounts included in the numerator or denominator, respectively, of lessee members within the combined group.. Except as provided above, leases between group members are disregarded for purposes of the property factor. For purposes of this paragraph, actual use of property shall not include sublease of the property to another party. The inter-group rental of property shall be at fair market value for purposes of determining the property factors of the lessor and the lessee.

   Example. A combined group includes Company A, which owns a building with original cost of $10 million, and Company B, which leases from Company A and actually uses one floor of the building at a fair market annual rent of $250,000. The property is located in Massachusetts. The numerator and denominator of B's property factor shall include $2 million (i.e. 8 x $250,000) attributable to the intercompany lease. The numerator and denominator of A's property factor shall include $8 million, which equals the original cost of $10 million, reduced by the amounts in the numerator and denominator of B's property factor.

(h) Combined group that includes financial institutions and non-financial institutions. The calculation of apportionment factors for individual financial institutions under G.L. c. 63, § 2A, and for individual non-financial business corporations under G.L. c. 63, § 38, vary in certain respects. In particular, a financial institution includes various interest and other amounts in its receipts factor under G.L. c. 63, § 2A, that would generally be excluded from the sales factor of a non-financial business corporation under G.L. c. 63, § 38. Similarly, the property factor of a financial institution includes intangible property, whereas the property factor of a non-financial business

corporation is limited to tangible property. In order to provide more consistent methodology in the determination of apportionment factors where a combined group of corporations consists of at least one member that is a financial institution as defined in G.L. c. 63, § 1, and at least one member that is not a financial institution, the following adjustments shall be made to the numerators and denominators of the apportionment factors of the group members.

1. Any member of the combined group that is a financial institution shall adjust the numerator and denominator of its property factor so that the value of intangible property included in the factor is reduced by eighty percent of the amount otherwise determined under G.L. c. 63, § 2A.

2. Any member of the combined group that is not a financial institution shall adjust the numerator and denominator of its sales factor so that any interest or other receipts of the member described in G.L. c. 63, § 2A(d)(i)-(d)(xi) and otherwise excluded from the sales factor determined under G.L. c. 63, § 38, are added to the sales factor denominator of the member and are added to the sales factor numerator of the member to the extent such receipts are sourced to Massachusetts under G.L. c. 63, § 2A(d)(i)-(d)(xi).

3. In the case of a sale or deemed sale of a business, receipts from the sale of the business "good will" or similar intangible value, including without limitation "going concern value" and "workforce in place," shall not be included in the sales factor denominators of any member.

4. The denominator of the combined group's property, payroll, and sales/receipts factors shall be the sum of the denominators of each individual member's respective factors, as separately determined and adjusted under this subsection. The denominators of the combined group's factors shall be used by any taxable member, whether or not such member is individually classified as a financial institution, in determining its individual Massachusetts apportionment percentage.

(i) Mutual fund service corporations. A mutual fund service corporation is any corporation doing business in the Commonwealth which derives more than fifty percent of its gross income as determined on a separate company basis from the provision, directly or indirectly, of management, distribution or administrative services to or on behalf of a regulated investment company and from trustees, sponsors, and participants of employee benefits plans which have accounts in a regulated investment company. It must separate its gross income into two categories, mutual fund sales and non-mutual fund sales. The receipts from mutual fund sales are assigned to the numerator of the sales factor in accordance with 830 CMR 63.38.7. For purposes of apportioning the income of the combined group, the mutual fund service corporation is treated as two separate members, i.e., one with a mutual fund sales business and one with a non-mutual fund sales business. It must calculate two apportionment percentages using two sets of

apportionment factors, one for its mutual fund sales business and one for its non-mutual fund sales business. The mutual fund business will determine its share of the combined group's income apportioned to Massachusetts using a single sales factor calculated in accordance with 830 CMR 63.38.7. The non-mutual fund business will determine its share of the combined group's income apportioned to Massachusetts using a three factor apportionment with a double weighted sales factor. The total of these amounts will be the corporation's income apportioned to Massachusetts. The property values and payroll expenses of the mutual fund service corporation that are directly traceable to its non-mutual fund sales business are included in the property and payroll factors, respectively, used to determine the apportionment percentage of the mutual fund service corporation's non-mutual fund sales business. The property values and payroll expenses of the mutual fund service corporation that are not directly traceable to either its mutual fund sales business or its non-mutual fund sales business are allocated between its mutual fund sales business and non-mutual fund sales business in the same ratio that each type of sale bears to the total Massachusetts sales of the mutual fund service corporation. Sales of a non-nexus member are assigned to the mutual fund sales business and the non-mutual fund sales business of the mutual fund service corporation according to the provisions of 830 CMR 63.32B.1(7)(b). In determining whether a member of a combined group is a mutual fund service corporation, the Commissioner reserves the right to disregard or reassign transactions among combined group members as necessary to avoid the distortion of the applicable apportionment method.

(j) Interaction with alternative apportionment rules. Where the apportionment methods provided under G.L. c. 63, §§ 2A and 38 generally, are not reasonably adapted to approximate the net income from business carried on in Massachusetts, an alternative apportionment method may apply to the extent provided in G.L. 63, §§ 2A(g), 38(j) or 42. In general, such alternative apportionment rules affect inclusion or exclusion of particular items in the apportionment factor numerator(s) of an individual corporation and therefore do not alter the apportionment rules provided by this section. Such alternative apportionment rules, may, however, modify the provisions of this section to the extent specified in alterative apportionment regulations promulgated under G.L. 63, § 38(j), or to the extent specified in agreements relating to individual taxpayers under G.L. 63, §§ 2A(g) and 42. Such modification might be necessary, for example, in the case of alternative apportionment methods adding or deleting particular types of property, payroll, or receipts from the factors described in G.L. 63, §§ 2A and 38, or in the case of alternative apportionment methods invoking unique apportionment factors unrelated to property, payroll, or receipts. In such cases, the alternative modifications may affect the factors of the group as a whole or the factors of one or more members, to the extent specified in such alternative apportionment regulations or agreements.

(k) Examples.

Example 1. *Combined nexus and non-nexus general business corporations, where the non-nexus general business corporation has no Massachusetts sales.* X, Y and Z are corporations engaged in a unitary business during tax year 2009. For taxable year 2009, X and Y are general business corporations subject to three factor apportionment with a

double weighted sales factor under G.L. c. 63, § 38 and taxable under G.L. c. 63, § 39; whereas Z is a non-taxpayer corporation that would be subject to apportionment as a general business corporation under § 38 and would be taxable under § 39 if it were subject to tax in Massachusetts. The combined group's taxable income as determined under 830 CMR 63.32B.1(6)(c) is $100,000. The apportionment information and factor and tax determinations of the three corporations are as follows.

(a) Apportionment information

	X (nexus) Bus. corp.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	$5,000,000	$1,000,000		
Everywhere property	$17,000,000	$1,000,000	$2,000,000	$20,000,000
MA payroll	$1,000,000	$5,000,000		
Everywhere payroll	$2,000,000	$5,000,000	$1,000,000	$8,000,000
MA sales	$5,000,000	$1,000,000		
Everywhere sales	$10,000,000	$3,000,000	$2,000,000	$15,000,000

(b) Apportionment factor computation

	Member X	Member Y	Member Z
Property numerator	$5,000,000	$1,000,000	n/a
Property denominator	$20,000,000	$20,000,000	n/a
Property factor	25.00%	5.00%	n/a
Payroll numerator	$1,000,000	$5,000,000	n/a
Payroll denominator	$8,000,000	$8,000,000	n/a
Payroll factor	12.50%	62.50%	
Sales numerator	$5,000,000	$1,000,000	n/a
Sales denominator	$15,000,000	$15,000,000	n/a
Sales factor	33.33%	6.67%	n/a
Apportionment %	26.04%*	20.21%*	n/a

*Three factor, double weighted sales

(c) Tax determination

	Member X	Member Y	Member Z	Total

Apportionment $%	26.04%	20.21%	n/a	
Combined group TI	$100,000	$100,000	n/a	
Apportioned income	26,040	20,210	n/a	
Tax rate	9.50%	9.50%	n/a	
Tax	$2,474	$1,920	n/a	4,394

Example 2. *Combined nexus and non-nexus general business corporations, where the non-nexus general business corporation has Massachusetts sales.* The facts are the same as in example 1, except that Z has $1,000,000 in Massachusetts sales. Therefore, because Z is a non-nexus corporation, an additional step is required for purposes of computing the apportionment formulas of X and Y, wherein the Massachusetts sales of Z are re-attributed to X and Y. *See* 830 CMR 63.32B.1(7)(b).

(a) Apportionment information

	X (nexus) Bus. corp.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	$5,000,000	$1,000,000		
Everywhere property	$17,000,000	$1,000,000	$2,000,000	$20,000,000
MA payroll	$1,000,000	$5,000,000		
Everywhere payroll	$2,000,000	$5,000,000	$1,000,000	$8,000,000
MA sales	$5,000,000	$1,000,000	$1,000,000	
Everywhere sales	$10,000,000	$3,000,000	$2,000,000	$15,000,000

(b) Apportionment factor computation

(i) Assign Z's Massachusetts sales to X and Y

	Member X	Member Y	Member Z
Nexus member MA sales	$5,000,000	$1,000,000	n/a
Total nexus members' MA sales	$6,000,000	$6,000,000	n/a
Nexus member sales %	83.33%	16.67%	n/a
Non-nexus member sales	n/a	n/a	$1,000,000
Assigned non-nexus member sales	$833,333	$166,667	n/a
Sales factor numerator	$5,833,333	$1,166,667	n/a

(ii) Determine apportionment factors

	Member X	Member Y	Member Z
Property numerator	$5,000,000	$1,000,000	n/a
Property denominator	$20,000,000	$20,000,000	n/a

Property factor	25.00%	5.00%	n/a
Payroll numerator	$1,000,000	$5,000,000	n/a
Payroll denominator	$8,000,000	$8,000,000	n/a
Payroll factor	12.50%	62.50%	
Sales numerator	$5,833,333	$1,166,667	n/a
Sales denominator	$15,000,000	$15,000,000	n/a
Sales factor	38.89%	7.78%	n/a
Apportionment %	28.82%*	20.76%*	n/a

*Three factor, double weighted sales

(c) Tax determination

	Member X	Member Y	Member Z	Total
Apportionment $%	28.82%	20.76%	n/a	
Combined group TI	$100,000	$100,000	n/a	
Apportioned income	$28,820	$20,760	n/a	
Tax rate	9.50%	9.50%	n/a	
Tax	$2,738	$1,972	n/a	$4,710

Example 3. *Combined nexus and non-nexus general business and manufacturing corporations, where the non-nexus general business corporation has Massachusetts sales.* The facts are the same as in example 2, except that X is not a general business corporation but rather a manufacturing corporation subject to single sales factor apportionment under G.L. c. 63, § 38. Assume for purposes of the example that X does not sell any of its manufactured property to Y or Z such that the provisions of 830 CMR 63.32B.1(7)(g)2 are implicated.

(a) Apportionment information

	X (nexus) Manuf. corp.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	$5,000,000	$1,000,000		
Everywhere property	$17,000,000	$1,000,000	$2,000,000	$20,000,000
MA payroll	$1,000,000	$5,000,000		
Everywhere payroll	$2,000,000	$5,000,000	$1,000,000	$8,000,000
MA sales	$5,000,000	$1,000,000	$1,000,000	
Everywhere sales	$10,000,000	$3,000,000	$2,000,000	$15,000,000

(b) Apportionment factor computation

(i) Assign Z's Massachusetts sales to X and Y

	Member X	Member Y	Member Z
Nexus member's MA sales	$5,000,000	$1,000,000	n/a
Total nexus member MA sales	$6,000,000	$6,000,000	n/a
Nexus member sales %	83.33%	16.67%	n/a
Non-nexus member sales	n/a	n/a	$1,000,000
Assigned non-nexus member sales	$833,333	$166,667	n/a
Sales factor numerator	$5,833,333	$1,166,667	n/a

(ii) Determine apportionment factor

	Member X	Member Y	Member Z
Property numerator	n/a	$1,000,000	n/a
Property denominator	n/a	$20,000,000	n/a
Property factor	n/a	5.00%	n/a
Payroll numerator	n/a	$5,000,000	n/a
Payroll denominator	n/a	$8,000,000	n/a
Payroll factor	n/a	62.50%	
Sales numerator	$5,833,333	$1,166,667	n/a
Sales denominator	$15,000,000	$15,000,000	n/a
Sales factor	38.89%	7.78%	n/a
Apportionment %	38.89%*	20.76%**	n/a

* Single factor, sales
**Three factor, double weighted sales

(c) Tax determination

	Member X	Member Y	Member Z	Total
Apportionment $%	38.89%	20.76%	n/a	
Combined group TI	$100,000	$100,000	n/a	
Apportioned income	$38,890	$20,760	n/a	
Tax rate	9.50%	9.50%	n/a	
Tax	$3,695	$1,972	n/a	$5,667

Example 4. *Combined nexus and non-nexus general business and financial corporations, where the non-nexus general business corporation has no Massachusetts*

sales. X, Y and Z are corporations engaged in a unitary business during tax year 2009. For taxable year 2009 the corporations reflect the following facts: X is a financial institution subject to three factor apportionment under G.L. c. 63, § 2A and taxable under G.L. c. 63, § 2; Y is a general business corporation subject to three factor double weighted sales factor apportionment under G.L. c. 63, § 38 and taxable under G.L. c. 63, § 39; Z is a non-nexus taxpayer corporation that would be subject to apportionment as a general business corporation under § 38 and would be taxable under § 39 if it were subject to tax in Massachusetts. For taxable year 2009, X, a financial institution, has $105,000,000 in everywhere property as determined under G.L. c. 63, § 2A, which includes $100,000,000 in intangible property (e.g., loans and credit card receivables). Because X is to be combined with one or more general business corporations, it must reduce the value of its intangible property by 80% for purposes of determining the group property factor. See 830 CMR 63.32B.1(7)(h). Because Y is to be combined with a financial institution, it must adjust its sales factor numerator and denominator for purposes of determining the group sales factor by including sales that would be included in Y's sales factor computations if it were subject to G.L. c. 63, § 2A(d)(i)-(d)(xi). *See id.* The combined group's taxable income as determined under 830 CMR 63.32B.1(6)(c) is $100,000. The apportionment information and factor and tax determinations of the three corporations are as follows.

(a) Apportionment information

	X (nexus) Fin. Inst.	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	$20,000,000	$2,000,000		
MA property adjusted	$4,000,000*	$2,000,000		
Everywhere property	$105,000,000	$2,000,000	$3,000,000	
Everywhere property adjus'd	$25,000,000*	$2,000,000	$3,000,000	$30,000,000
MA payroll	$1,000,000	$5,000,000		
Everywhere payroll	$2,000,000	$5,000,000	$1,000,000	$8,000,000
MA sales	$5,000,000	$1,000,000		
MA sales adjusted	$5,000,000	$1,500,000**		$6,500,000
Everywhere sales	$10,000,000	$3,000,000	$2,000,000	$15,000,000
Everywhere sales adjusted	$10,000,000	$4,000,000**	$2,000,000	$16,000,000

*X's Massachusetts property and everywhere property is adjusted to reduce its intangible assets by 80%; since X has $5,000,000 in tangible assets located outside the state, in addition to $100,000,000 in total intangible assets, its everywhere property is reduced from $105,000,000 to $25,000,000

**Y's Massachusetts and everywhere sales are adjusted to include sales that would be included in Y's sales factor computations if it were subject to the financial institution apportionment rules set forth at G.L. c. 63, § 2A(d)(i)-(d)(xi)

(b) Apportionment factor computation

	Member X	Member Y	Member Z
Property numerator	$4,000,000	$2,000,000	n/a
Property denominator	$30,000,000	$30,000,000	n/a
Property factor	13.33%	6.67%	n/a
Payroll numerator	$1,000,000	$5,000,000	n/a
Payroll denominator	$8,000,000	$8,000,000	n/a
Payroll factor	12.50%	62.50%	
Sales numerator	$5,000,000	$1,500,000	n/a
Sales denominator	$16,000,000	$16,000,000	n/a
Sales factor	31.25%	9.38%	n/a
Apportionment %	19.03%*	21.98%**	n/a

*Three factor, equal weighting
**Three factor, double weighted sales

(c) Tax determination

	Member X	Member Y	Member Z	Total
Apportionment $%	19.03%	21.98%	n/a	
Combined group TI	$100,000	$100,000	n/a	
Apportioned income	$19,030	$21,980	n/a	
Tax rate	10.50%	9.50%	n/a	
Tax	$1,998	$2,088	n/a	4,086

Example 5. *Combined S and C corporations where resident and non-resident shareholders.* S1, S2 and C are corporations engaged in a unitary business during tax year 2009 with business activities both within and without Massachusetts. All three corporations have the same two 50% individual shareholders, one of whom, R, is a resident and one of whom, NR, is a non-resident. The gross receipts for the unitary group for tax year 2009, net of intercompany eliminations, exceeds $6 million. S1 is a manufacturing corporation within the meaning of G.L. c. 63, § 38, whereas both S2 and C are general business corporations. Both R and NR have federal distributive share income from S1 and S2 and also dividend income from C. S1, S2 and C have only unitary business activity from their joint activities and, for example, none of the corporations have any allocable income. The combined group has net income of $4,000,000. The apportionment information for the corporations is as follows.

	S1 (nexus) Manuf. Corp	S2 (nexus) Bus. corp.	C (nexus) Bus. corp.	Combined
MA property	$20,000,000	$12,000,000	$4,000,000	
Everywhere property	$60,000,000	$24,000,000	$20,000,000	$104,000,000
MA payroll	$1,000,000	$5,000,000	$100,000	
Everywhere payroll	$2,000,000	$5,000,000	$2,000,000	$9,000,000
MA sales	$15,000,000	$6,000,000	$1,000,000	
Everywhere sales	$30,000,000	$10,000,000	$20,000,000	$60,000,000

Chapter 63 analysis. To determine their apportioned chapter 63 income, the three corporations perform the same analysis as would apply in a case involving only C corporations (*see*, e.g., example 4). Since S1 is a manufacturing corporation it applies a single sales factor apportionment percentage. Since both S1 and C are general business corporations, they apply a three factor apportionment percentage that includes a double weighted sales factor. Upon determining their apportioned chapter 63 income, S1 and S2 apply the tax rate as determined under G.L. c. 63, § 32D, whereas C applies the tax rate as determined under G.L. c. 63, § 39.

	S1 (nexus) Manuf. Corp	S2 (nexus) Bus. corp.	C (nexus) Bus. corp.
Property numerator	n/a	$12,000,000	$ 4,000,000
Property denominator	n/a	$104,000,000	$104,000,000
Property factor	n/a	11.54%	3.85%
Payroll numerator	n/a	$5,000,000	$100,000
Payroll denominator	n/a	$9,000,000	$9,000,000
Payroll factor	n/a	55.56%	1.11%
Sales numerator	$15,000,000	$6,000,000	$1,000,000
Sales denominator	$60,000,000	$60,000,000	$60,000,000
Sales factor	25%	10%	1.67%
Apportionment %	25%	21.77%*	2.07%*
MA Apportioned Income	$1,000,000	$870,940	$82,906

*Three factor double weighted sales

Chapter 62 analysis. R is taxable on federal distributive share income from S1 and S2 without any adjustment, although R may claim a credit against this distributive share income for other state income tax paid on such distributive share by R or S1 or S2. R is taxable on its dividends from C with no credit applicable. NR has federal distributive

share income from S1 and S2 and is taxable on its apportioned share of this income. *See* G.L. c. 62, § 5A(b) (allowing the Commissioner to adopt regulatory rules as to non-resident taxation). In the case of S1, the apportionment is done using single sales factor apportionment, whereas in the case of S2, the apportionment is done using three factor apportionment with a double weighted sales factor. NR is to file a Massachusetts non-resident return that documents its apportioned S1 and S2 income as Massachusetts source income. If either S1 or S2 had any allocable income, NR's distributive share of this allocable income would not be apportioned but rather would be either 100% taxable or non-taxable in Massachusetts depending upon whether the income is allocable to Massachusetts. Because S1 and S2 have nonresident partners both S1 and S2 must compute their own separate apportionment percentages to determine the nonresident's distributive share of Massachusetts source income from S1 and S2.

	S1 (nexus) Manuf. Corp	S2 (nexus) Bus. corp.
Property numerator	n/a	$12,000,000
Property denominator	n/a	$24,000,000
Property factor	n/a	50%
Payroll numerator	n/a	$5,000,000
Payroll denominator	n/a	$5,000,000
Payroll factor	n/a	100%
Sales numerator	$15,000,000	$6,000,000
Sales denominator	$30,000,000	$10,000,000
Sales factor	50%	60%
Apportionment %	50%	67.50%*
MA Apportioned Income	$500,000	$675,000

*Three factor, double weighted sales

As a Massachusetts resident, R would report his distributive share of the net incomes of both S1 and S2 on R's personal income tax return. As a nonresident, NR would report 50% of NR's distributive share from S1 as Massachusetts source income and 67.5% of NR's distributive share income from S2 as Massachusetts source income on NR's Massachusetts non-resident income tax return.

Example 6. *Combined S and C corporations where resident and non-resident shareholders.* The facts are the same as in Example 5 except that the combined group is engaged in business only in Massachusetts and therefore is not entitled to apportion its income. In this case, 100% of NR's federal distributive share income from S1 and S2 is Massachusetts source income taxable to NR.

Example 7. *Combined mutual fund service corporation and nexus and non-nexus general business corporation where the non-nexus general business corporation has Massachusetts sales.* X, Y and Z are corporations engaged in a unitary business during tax year 2009. For taxable year 2009, X is a mutual fund service corporation subject to single sales factor apportionment under G.L. c. 63, § 38. As a mutual fund service corporation, X must separate its gross income into two categories, mutual fund sales and non-mutual fund sales (i.e. other sales). Therefore, for purposes of the combined group, X is treated as two separate members. X derives 80% of its gross income from mutual fund sales, and 20% of its gross income from other sales. Y is a general business corporation subject to three factor apportionment with a double weighted sales factor under G.L. c. 63, § 38 and taxable under G.L. c. 63, § 39. Z is a non-taxpayer corporation that would be subject to apportionment as a general business corporation under § 38 and would be taxable under § 39 if it were subject to tax in Massachusetts. Z has $1,000,000 in Massachusetts sales. Therefore, because Z is a non-nexus corporation, an additional step is required for purposes of computing the apportionment formulas of and Y, wherein the Massachusetts sales of Z are re-attributed to X and Y. *See* 830 CMR 63.32B.1(7)(b). The combined group's taxable income as determined under 830 CMR 63.32B.1(6)(c) is $100,000. Further, assume for purposes of the example that X does not provide mutual fund services to Y or Z such that the provisions of 830 CMR 63.32B.1(7)(g) are implicated. The apportionment information and factor and tax determinations of the three corporations are as follows.

(a) Apportionment information

	X (nexus) (mut. fund)	X (nexus) (other sales)	Y (nexus) Bus. corp.	Z (no nexus) Bus. corp.	Combined
MA property	$ 3,000,000	$2,000,000	$1,000,000		
Everywhere property	$15,000,000	$2,000,000	$1,000,000	$2,000,000	$20,000,000
MA payroll	$ 850,000	$ 150,000	$5,000,000		
Everywhere payroll	$1,600,000	$ 400,000	$5,000,000	$1,000,000	$8,000,000
MA sales	$4,000,000	$1,000,000	$1,000,000	$1,000,000	
Everywhere sales	$8,000,000	$2,000,000	$3,000,000	$2,000,000	$15,000,000

(b) Apportionment factor computation

(i) Assign Z's Massachusetts sales to X and Y

	Member X (mut. fund)	Member X (other sales)	Member Y	Member Z
Nexus member MA sales	$4,000,000	$1,000,000	$1,000,000	n/a
Total nexus member MA sales	$6,000,000	$6,000,000	$6,000,000	n/a

Nexus member sales %	66.66%	16.67%	16.67%	n/a
Non nexus member sales	n/a	n/a	n/a	$1,000,000
Assigned non nexus member sales	$ 666,666	$ 166,667	$ 166,667	n/a
Sales factor numerator	$4,666,666	$1,166,667	$1,166,667	n/a

(ii) Determine apportionment factor

	Member X (mut. fund)	Member X (other sales)	Member Y	Member Z
Property numerator	n/a	$ 2,000,000	$ 1,000,000	n/a
Property denominator	n/a	$20,000,000	$20,000,000	n/a
Property factor	n/a	1.00%	5.00%	n/a
Payroll numerator	n/a	$ 150,000	$ 5,000,000	n/a
Payroll denominator	n/a	$ 8,000,000	$ 8,000,000	n/a
Payroll factor	n/a	1.87%	62.50%	n/a
Sales numerator	$ 4,666,666	$ 1,166,667	$ 1,166,667	n/a
Sales denominator	$15,000,000	$15,000,000	$15,000,000	n/a
Sales factor	31.11%	7.78%	7.78%	n/a
Apportionment %	31.11%*	4.85%**	20.76%**	n/a

* Single factor, sales
**Three factor, double weighted sales

(c) Tax determination

	Member X (mut. fund)	Member X (other sales)	Member Y	Member Z	Total
Apportionment $%	31.11%	4.85%	20.76%	n/a	
Combined group TI	$100,000	$100,000	$100,000	n/a	
Apportioned income	$31,110	$4,850	$20,760	n/a	
Tax rate	9.50%	9.50%	9.50%	n/a	
Tax	$2,955	$460	$1,972	n/a	$5,387

(8) Net Operating Loss Carry Forwards

(a) General. For taxable years beginning on or after January 1, 2009, if the computation of a combined group's taxable income results in a taxable net loss, a taxable member of such group may carry forward its apportioned share of the loss to offset against its post apportioned taxable income derived from the combined group in a future year to the extent the carry forward and offset is consistent with the requirements and limitations set forth in G.L. c. 63, § 30.5 and chapter 63 generally. A taxpayer shall determine its

Massachusetts apportioned share of a combined group's taxable income prior to the deduction of any net operating loss (NOL) carry forwards for a taxable year. Further, any taxpayer that has more than one NOL carry forward derived from losses incurred in more than one tax year shall apply such carry forwards in the order that the underlying loss was incurred, with the oldest carry forward to be deducted first. Neither a financial institution taxable under G.L. c. 63, § 2 nor a utility corporation taxable under G.L. c. 63, 52A is permitted to carry forward a net operating loss.

(b) Possible Sharing of NOL Carry Forwards.

(i) A taxable member of a combined group that has a NOL carry forward that derived from a loss incurred from the activities of the combined group in a taxable year beginning on or after January 1, 2009, may share the NOL carry forward with the other taxable members of the group as provided in this section. The taxable member that has a NOL carry forward must first deduct the carry forward against its post apportioned Massachusetts taxable net income derived from the combined group, if any. Then, to the extent the taxpayer has excess NOL carry forward, it may share that excess with the other taxable members of the combined group that were members of the combined group during the year in which the underlying loss was incurred in the manner described in paragraph (ii) of this subsection,, provided, however, that the excess NOL carry forward may not be shared with either a financial institution taxable under G.L. c. 63, § 2 or a utility corporation taxable under G.L. c. 63, § 52A. A taxable member of the combined group that was not a member of a combined group during the year in which the activities of the group resulted in a net operating loss are not subsequently entitled to share in the use of the NOL carry forward.

(ii) The other taxable members of a combined group may use the taxable member's NOL carry forward as referenced in (i) to offset against their apportioned Massachusetts taxable net income derived from the combined group to the extent that they have such net income. In such cases, the other taxable members of the combined group must first deduct any NOL carry forwards that they individually possess, derived from losses that they previously incurred, before applying any excess NOL carry forward of any other combined group member. The NOL carry forwards of a taxable member of a combined group, including any carry forwards that a member seeks to share with the other taxable members of its combined group, shall be applied in the order that the underlying loss was incurred, with the oldest carry forward to be deducted first. Where a taxable member has an excess NOL that can be shared with more than one taxpayer group member such excess NOL must be allocated among those other members eligible to share in such NOL in a manner that is proportionate to the respective amounts of income that each such eligible group member has for the taxable year in which such excess NOL is to be shared after applying each such group member's own NOLs. In all cases, the use of the NOL carry forwards by the other taxable members of the combined group must be consistent with the requirements and limitations that govern the use of NOL carry forwards under G.L. c. 63, § 30.5 and chapter 63 generally, including the requirement that the oldest NOLs must be utilized first. Any amount of a NOL carry forward that is subsequently deducted by any taxable member of a combined group shall reduce the amount of the

NOL that may subsequently be carried forward by the taxpayer that originally incurred the loss.

(c) Ownership of NOL carry forward; situation where carry forward owner leaves combined group. NOLs shall be carried forward from year to year separately by the individual taxpayer that originally incurred the underlying loss and therefore remain the tax attribute of that member, although such carry forwards may be shared in some cases with the other taxable members of a combined group as noted in this section. Consequently, in any case in which a taxable member of a combined group ceases to be a member of the combined group, for whatever reason, any NOL carry forward owned by such taxpayer is no longer available for use by the other taxable members of the combined group with which the taxpayer was previously affiliated. In such cases, if the taxpayer becomes a member of a new combined group, the taxpayer may not share the NOL carry forward with the taxable members of its new combined group unless one of the taxable members of the new combined group was also a member of the taxpayer's combined group during the year the loss was incurred and all the other requirements referenced in this section are met. Where a taxpayer that has a NOL carry forward becomes a member of a new combined group, the change of ownership rules set forth in IRC § 382 as applied under Massachusetts law may apply, though any amount of NOL carry forward that cannot be applied because of these limitations may be carried forward consistent with the rules and limitations discussed above. *See* 830 CMR 63.30.2(11). In the event that a member of a combined group has a NOL carry forward and subsequently takes part in a merger or consolidation, the NOL carry forward will be lost if, for example, the member liquidates or terminates as a result of the merger or consolidation. *See id.*

(d) Pre-2009 NOL carry forwards. Where a taxable member of a combined group has a NOL carry forward that derives from a loss incurred in a taxable year beginning prior to January 1, 2009, the carry forward shall remain available to be deducted by the taxpayer that incurred the loss in a subsequent tax year as permitted under Massachusetts law as in effect during the year that the loss was incurred, subject to the limitation set forth in 830 CMR 63.32B.1(8)(f). Consequently, such NOL carry forwards as allowed under G.L. c. 63, § 30(5)(b) may only be deducted by the taxpayer that incurred the loss and cannot be shared by the taxpayer with the other taxable members of its combined group. Further, as neither a financial institution taxable under G.L. c. 63, § 2 nor a utility corporation taxable under G.L. c. 63, 52A was entitled to a NOL carry forward under the law in effect prior to January 1, 2009, such taxpayers cannot carry forward a NOL derived from a loss that was incurred for a taxable year beginning prior to January 1, 2009. For taxable years beginning prior to January 1, 2009 a taxpayer's NOL carry forward was to be "grossed up" to reflect a post-apportionment calculation, by dividing the amount of any unused loss by the taxpayer's apportionment percentage from the year in which the loss was incurred. However, to apply such a carry forward to apportioned income that derives from the activity of a combined group for a taxable year beginning on or after January 1, 2009, the taxable member of the group must first convert the NOL carry forward to a post-apportionment calculation. Therefore, in the case of a NOL carry forward that derives from a loss incurred in the taxpayer's 2008 taxable year, the taxable member of a

combined group shall carry forward the loss to its 2009 taxable year on a 2008 post-apportioned basis. Also, in the case of a NOL carry forward that derives from a loss incurred in the taxpayer's 2007 taxable year or an earlier taxable year, any remaining carry forward from such year shall be multiplied by the taxpayer's apportionment percentage from that year for purposes of being carried forward by the taxpayer to its 2009 tax year, or thereafter.

(e) Carry forwards from prior to inclusion in a combined group. Where a taxpayer corporation that was not previously a member of a combined group enters a pre-existing combined group or becomes part of a new combined group with one or more other corporations, the corporation may continue to deduct any NOL carry forwards that it has from prior taxable years against its apportioned income as derived from the combined group, subject to the limitation set forth in 830 CMR 63.32B.1(8)(f). However, in such cases a taxpayer's pre-combination NOL carry forward was to be "grossed up" to reflect a pre-apportionment calculation, by dividing the amount of any unused loss by the taxpayer's apportionment percentage from the year in which the loss was incurred. To apply such a carry forward to apportioned income that derives from the activity of a combined group for a taxable year beginning on or after January 1, 2009, the taxable member of the group must first convert the NOL carry forward to a post-apportionment calculation. To do so, the taxpayer must multiply the remaining NOL carry over from any individual pre-combination year by the taxpayer's apportionment percentage from that year.

(f) Limitation on use of pre-combination NOL. Where a taxable member of a combined group is carrying forward NOL from a year or years beginning prior to January 1, 2009, or from a year or years in which the corporation was not a member of the combined group, the use of the corporation's NOL is limited to the amount of the current year combined group taxable income that would be apportioned to the member as determined by using the dollar amounts of the member's Massachusetts apportionment factor numerators in the year(s) in which the loss was incurred (determined, in the case of the sales factor, by excluding all 'throwback sales' other than destination sales 'thrown back' in the year of the loss from jurisdictions in which no member of the combined group is subject to tax in the year the NOL deduction is taken) and the current year group denominators. In the case of NOL carry forward from two or more such years, the Massachusetts apportionment factor numerators shall be averaged for all such loss years, weighing the factors for each loss year in accordance with the amount of the loss carried forward to the current year, and the resulting average Massachusetts property, payroll, and sales factor numerators shall be divided by the current year group denominators to determine an apportionment percentage. The apportionment percentage thus determined shall be multiplied by the current year combined group taxable income. The product is the maximum current year income of the member that may be offset in the taxable year by its pre-combination NOL carry forward, subject to any other applicable loss carry forward limitation. The Commissioner may disregard material transactions among affiliated entities on or after November 1, 2008, to the extent that such transactions would effect the limitation under this section.

(g) Examples. (In these examples, it is assumed under the particular facts that the dollar amounts of the Massachusetts apportionment factor numerators of the corporations remain constant for the years discussed, so that the limitation in 830 CMR 63.32B.1(8)(f) does not restrict the use of the NOL carry forwards).

Example 1. X and Y are commonly owned taxpayer corporations during the three year period 2007-2009. X is a general business corporation taxable under G.L. c. 63, § 39, whereas Y is a financial institution taxable under G.L. c. 63, § 2. For taxable year 2007, X has a 20% apportionment and an apportioned loss of $10,000, which "grosses up" to a pre-apportionment NOL of $50,000 ($10,000 divided by .20) to carry forward. Y also has a loss for tax year 2007, but because it is a financial institution it cannot carry forward this loss. In taxable year 2008, X again has an apportionment percentage of 20%, but has no taxable income, whereas Y has apportioned taxable income of $20,000. Although X has a NOL carry forward of $50,000 from 2007 in taxable year 2008 that NOL carry forward cannot be shared with Y. In tax year 2009, the two corporations are engaged in a unitary business. In conducting their 2009 unitary business, the XY combined group has combined income of $100,000, and X and Y have respective apportionment percentages of 20% and 10%. Therefore, X and Y's respective share of the 2009 combined group's taxable income is $20,000 and $10,000. X has a pre-apportioned NOL carry forward of $50,000 from 2007 that must be converted into a post apportionment computation for purposes of X using this NOL as a deduction against its 2009 income. To accomplish this conversion, X multiplies its $50,000 2007 carry forward by its 2007 apportionment percentage of 20% and grosses the carry forward down to $10,000. Consequently X has a $10,000 2007 NOL carry forward that can be applied against its $20,000 of income for the 2009 tax year. X has no remaining carry forward from 2007 that can be brought forward into 2010.

Example 2. X, Y and Z are commonly owned taxpayer corporations taxable under G.L. c. 63, § 39 during the three year period 2008-2010. For taxable year 2008, X, Y and Z file as a combined group under the predecessor version of G.L. c. 63, § 32B, which has been repealed for taxable years beginning after January 1, 2009. X has an apportioned loss of $100,000 for 2008 and Y and Z have apportioned income, respectively, of $25,000 and $50,000. Consequently, in 2008 $75,000 of X's loss is used to offset the apportioned income of Y and Z and $25,000 remains to be carried forward. In tax year 2009, the three corporations are engaged in a unitary business. In conducting their 2009 unitary business, the XYZ combined group has a combined loss of $80,000, and X, Y and Z have respective apportionment percentages of 25%, 20% and 10%. Consequently, X, Y and Z have an apportioned share of the combined group's loss for 2009 that is, respectively, $20,000, $16,000 and $8,000. In 2010 the XYZ combined group remains unchanged and has combined taxable income of $300,000, and X, Y and Z have respective apportionment percentages of 33.4%, 5% and 10%. Therefore, X, Y and Z's respective share of the 2010 group's income is, respectively, $100,000, $15,000 and $30,000. The Massachusetts income and loss attributes for the XYZ group for tax years, 2009-2010, is computed as follows.

Tax year 2009

Entity	Combined Income	App%	MA Income	2009 NOL to carry forward	2008 NOL carry forward
X	($80,000)	25%	($20,000)	($20,000)	($25,000)
Y	($80,000)	20%	($16,000)	($16,000)	n/a
Z	($80,000)	10%	($ 8,000)	($8,000)	n/a

Tax year 2010

Entity	Combined Income	App%	MA Income	NOL carry forward used	Taxable Income
X	$300,000	33.34%	$100,000	$45,714*	$54,286
Y	$300,000	5%	$ 15,000	$15,000**	$0
Z	$300,000	10%	$ 30,000	$ 8,286***	$21,714

* X applies its entire NOL carry forward from 2008, $25,000. X also applies its entire NOL carry forward from 2009, $20,000. X also uses $714 of Y's NOL carry forward from 2009, which is determined based upon its percentage of the income of X and Z after each corporation applies its own NOLs ($55,000/$77,000 multiplied by Y's $1,000 excess NOL).
** Y applies $15,000 of its NOL carry forward from 2009; it has $1,000 of NOL carry forward from 2009 that remains to share with X and Z.
*** Z applies its entire NOL carry forward from 2009, $8,000, plus Z applies $286 of Y's excess NOL carry forward from 2009, which is determined based upon its percentage of the income of X and Z after each corporation applies its own NOLs ($22,000/$77,000 multiplied by $1,000).

Example 3. X, Y and Z are commonly owned taxpayer corporations taxable under G.L. c. 63, § 39 during the three year period 2008-2010. For taxable year 2008, X, Y and Z file as a combined group under the predecessor version of G.L. c. 63, § 32B. X has an apportioned loss of $150,000 for 2008 and Y and Z have apportioned income, respectively, of $10,000 and $5,000. Consequently, in 2008 $15,000 of X's loss is used to offset the apportioned income of Y and Z and $135,000 remains to be carried forward. In tax 2009, the three corporations are engaged in a unitary business. In conducting their 2009 unitary business, the XYZ combined group has a combined loss of $20,000, and X, Y and Z have respective apportionment percentages of 10%, 50% and 10%. Consequently, X, Y and Z have an apportioned share of the combined group's loss for 2009 that is, respectively, $2,000, $10,000 and $2,000. In 2010 the XYZ combined group remains unchanged and has combined taxable income of $100,000, and X, Y and Z have respective apportionment percentages of 10%, 50% and 10%. Therefore, X, Y and Z's respective share of the group's 2010 income is, respectively, $10,000, $50,000 and $10,000. The Massachusetts income and loss attributes for the XYZ group for tax years, 2008-2010, is computed as follows

Tax year 2009

Entity	Combined Income	App%	MA Income	2009 NOL to carry forward	2008 NOL carry forward
X	($20,000)	10%	($2,000)	($2,000)	($135,000)
Y	($20,000)	50%	($10,000)	($10,000)	n/a
Z	($20,000)	10%	($2,000)	($2,000)	n/a

Tax year 2010

Entity	Combined Income	App%	MA Income	NOL carry forward used	Taxable Income
X	$100,000	10%	$10,000	$10,000*	$0
Y	$100,000	50%	$50,000	$11,667**	$38,333
Z	$100,000	10%	$10,000	$ 2,333***	$7,667

* X has $135,000 of carry forward from 2008 to apply. It applies $10,000 of its 2008 carry forward to eliminate its 2010 taxable income, leaving it with $125,000 to carry forward for its use in subsequent years. None of X's 2008 carry forward can be shared with Y or Z. X also has $2,000 of NOL carry forward from 2009 remaining, which can be shared with Y and Z.
** Y applies its $10,000 NOL carry forward from 2009; Y also uses $1,667 of X's NOL carry forward from 2009 (which unlike X's 2008 NOL carry forward can be shared), which is determined based upon its percentage of the income of Y and Z after each corporation applies its own NOLs ($40,000/$48,000 or 5/6).
*** Z applies its entire NOL carry forward from 2009, $2,000; Z also uses $333 of X's NOL carry forward from 2009, which is determined based upon its percentage of the income of Y and Z after each corporation applies its own NOLs ($8,000/$48,000 or 1/6).

(9) Credits

(a) General; possible sharing of credits within a combined group. In general, a tax credit generated by a taxpayer belongs to that taxpayer and can be applied against the excise of that taxpayer and in some cases against the excise of the affiliates of the taxpayer, subject to the rules that govern the use of the credit. Further, pursuant to G.L. c. 63, § 32B, for tax years beginning on or after January 1, 2009, a credit that may be validly claimed by a taxable member of a combined group and that is attributable to the combined group's unitary business may be shared with the other taxable members of the combined group to the extent such sharing of the credit is consistent with the statutory requirement for claiming the credit, taking into account the nature of the business and activities of each of the taxable members that seek to share the credit. Thus, for example, in the case of an investment tax credit (ITC) that is generated by a taxable member of a combined group pursuant to G.L. c. 63, § 31A for a taxable year beginning on or after January 1, 2009, such credit may be applied against the excise due from one or more other taxable members of the combined group if the qualified property is used in the combined group's unitary business and such other taxable members could have validly

claimed a credit under § 31A, e.g., as a manufacturing corporation. Also, in the case of a research credit that is generated by a taxable member of a combined group pursuant to G.L. c. 63, § 38M, for a taxable year beginning on or after January 1, 2009, such credit may be applied against the excise due from one or more other taxable group members if the credit derives from the unitary business of such group and the other taxable group members are corporations taxable under G.L. c. 63, § 39 or § 32D. In the case of a group of corporations for which an affiliated group election has been made, a credit that is validly claimed by a taxpayer in the combined group may be shared with the other taxable members of such group irrespective as to whether the combined group members sharing the credit are all engaged in a unitary business to the extent such sharing of the credit is consistent with the statutory requirement for claiming the credit, as noted above.

(b) Application of current year credits. In cases where a credit can be shared amongst the members of a combined group, the credit must first be applied against the excise of the taxpayer that generated the credit consistent with the requirements and limitations that apply to such credit, and then the excess may be applied against the excise of the other taxable members that are eligible to share the credit, again consistent with the requirements and limitations that apply to such credit. In general, the credit conferred under G.L. c. 63, §§ 31A and 38N are each subject to a 50% annual limitation and the credit conferred under § 38M is subject to a 75% annual limitation (i.e., the credit may not reduce the taxpayer's excise for the year by more than 50% or 75%, respectively, as the case may be), although the first $25,000 of the § 38M credit is not subject to any percentage limitation. A credit may be applied against a taxpayer's income or non-income measure determined under G.L. c. 63, § 39. However, under no circumstance may a general business corporation subject to tax under G.L. c. 63, § 39 reduce its excise to less than the minimum corporate excise as determined under § 39.

Example 1. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. These corporations have an income measure excise as determined under G.L. c. 63, § 39, before the application of any credits, of $10,000, $20,000 and $10,000, respectively. X is a manufacturing corporation within the meaning of G.L. c. 63, § 31A. Y is a research and development corporation within the meaning of § 31A that would be entitled to ITC if it made a qualified acquisition thereunder. Z is a corporation that is not referenced within the meaning of § 31A that would not be able to claim the ITC under that section even it acquired property as referenced therein. In tax year 2009, X purchases equipment to be used in the XYZ unitary business that generates $15,000 of ITC. Also, during tax year 2009, Y engages in activity as part of the unitary business that entitles it to $45,000 of research credit under G.L. c. 63, § 38M. The credits for the group are determined as follows.

Tax year 2009

Entity	Excise	Credit generated	Own credit used	Shared from X	Shared from Y	Excise post credits	Carry forward credit
X	$10,000	$ 15,000	$ 5,000	n/a	$ 4,544	$ 456	$ 8,581

Y	$20,000	$ 45,000	$ 18,125	$ 1,419	n/a	$ 456	$ 13,269
Z	$10,000	n/a	n/a	n/a	$ 9,062	$ 938	$ 0

X must use its ITC first, which results in it claiming $5,000 of ITC. X is then able to share any excess research credit of Y. X's research credit limitation is $9,062. (X's tax was $10,000 and the group's overall tax was $40,000 and so X contributed to 25% of the group's tax. Accordingly 25% of the $25,000 research credit limitation is applied to X. Thus 25% multiplied by the $25,000 credit limitation or $6,250 plus 75% of the remaining tax of $3,750 or $2,812 equals X's available research credit of $9,062.) However, the research credit is further limited to $4,544 so that the tax due by X is at least $456. Y must use its research credit first against its own excise. Y's available research credit for 2009 is $18,125 (50% of the $25,000 group limitation plus 75% of the remaining tax.). In addition, since Y, like X, is a corporation that is entitled to claim an ITC under § 31A, Y may share in X's ITC. The ITC is limited to 50% of Y's excise, and in this case is further limited so that Y's excise does not fall below $456. Therefore, Y can use $1,419 of X's ITC. Z may share Y's research credit. Z's share of Y's research credit is 25% of the group's $25,000 limitation plus 75% of any remaining excise.

(c) Carry forward of credits; post-2009 and pre-2009 credits.

(i) General; post-2009 credits. In general, a taxpayer that does not use the full amount of a credit generated in a taxable year may carry forward the amount of credit not used consistent with the statutory requirements for applying the credit. Where a taxpayer generates a credit for a taxable year beginning on or after January 1, 2009, the taxpayer may carry forward the portion of such credit that is not taken by the taxpayer and the other taxable members of the taxpayer's combined group. Any such credit that is carried forward by the taxable member may only be shared with a member of the taxpayer's current combined group that was, in addition, (a) a member of the taxpayer's combined group during the year (i.e., a tax year beginning on or after January 1, 2009) that the credit was generated or (b) is a successor in whole or part to one or more combined group members from such prior post-2008 tax year such that there is 100% continuity of ownership as between the successor corporation and one or more corporations that were in the combined group during such prior year. The requirements for sharing the carry forward of a credit that is generated for a taxable year beginning on or after January 1, 2009 are the same as those for sharing such a credit in the year that the credit was generated. That is, if the credit is attributable to the combined group's unitary business, the credit carry forward may be shared with the other taxable members of the combined group to the extent such sharing is consistent with the statutory requirement for claiming the credit, as discussed above. As in the case of the application of a credit for the tax year in which the credit was generated, a credit carry forward must first be applied against the excise of the taxpayer that generated the credit, and then any excess credit may be applied against the excise of the other taxable members of the combined group that may share the credit, in each case consistent with the requirements and limitations that apply to the credit.

Example 2. Same facts as in example 1. One year later, in tax year 2010, it remains the case that X, Y and Z are engaged in a unitary business. Also, it remains the case that X is a manufacturing corporation within the meaning of G.L. c. 63, § 31A; Y is a research and development corporation within the meaning of § 31A; and Z is a corporation that is not referenced within the meaning of § 31A and that would not be able to claim the ITC under § 31A even it acquired property as referenced therein. X has an excise of $2,000, Y has an excise of $4,000 and Z has an excise of $10,000. X also has $8,581 of ITC credit carry forward that may be shared with Y but not Z (the credit carry forward cannot be shared with Z because Z was not able to claim an ITC in tax year 2009). Y has a research credit carry forward of $13,269 that can be shared with both X and Z since the credit derived from the unitary business conducted by Y with both X and Z in 2009, and also in 2010 both X and Z are members of Y's combined group and are both corporations taxable under § 39. None of the corporations have any additional credits for 2010. The credits for the group are calculated as follows.

Tax year 2010

Entity	Excise	Carry forward	Own credit used	Shared from X	Shared from Y	Excise post credits	Carry forward credit
X	$ 2,000	$ 8,581	$ 1,000	n/a	$ 544	$ 456	$ 7,581
Y	$ 4,000	$ 13,269	$ 3,544	n/a	n/a	$ 456	$ -
Z	$ 10,000	n/a	n/a	n/a	$ 9,181	$ 819	$ -

X must use its ITC carry forward against its own excise first, which results in it claiming $1,000 of ITC. X is then able to share any excess research credit of Y. There is no research credit limitation because the entire group's excise is less than $25,000. Y must use its research credit first against its own excise. Y's may claim $3,544 of research credit and reduce its excise to $456. X may use $544 of Y's research credit to reduce its excise to $456. Z may also share Y's research credit**.** Z's is able to claim the remaining $9,181 in Y's research credit. Z's excise is reduced to $819.

Example 3. Same facts as in example 2, except that Y spins off part of its operations and forms a new taxpayer corporation, N, as a wholly owned subsidiary on January 1 of 2011, and N becomes part of the XYZ combined group as of that date. N and Y are both research and development corporations within the meaning of G.L. c. 63, § 31A that would be able to claim ITC thereunder. X has an excise of $2,000, Y has an excise of $4,000, Z has an excise of $10,000, and N has an excise of $4,000. The credits for the group are determined as follows.

Tax year 2011

Entity	Excise	Carry forward	Own credit used	Shared from X	Shared from Y	Excise post credit	Carry forward credit
X	$ 2,000	$ 7,581	$ 1,000	n/a	n/a	$ 1,000	$ 2,581
Y	$ 4,000	n/a	n/a	$2,000	n/a	$ 2,000	$ -
Z	$ 10,000	n/a	n/a	n/a	n/a	$ 10,000	$ -

N	$ 4,000	n/a	n/a	$2,000	n/a	$ 2,000	$ -

X may share its ITC credit carry forward with Y and N, both of which are entitled to reduce their excise by 50% consistent with the rules for claiming an ITC. Y can share X's ITC because it is entitled to claim an ITC during tax year 2011 and also was a member of Z's combined group during 2009, the tax year that the ITC was generated. N can share X's ITC because it is entitled to claim an ITC during tax year 2011 and also, though it was not a member of the XYZ combined group in the tax year that the ITC was generated, N is a successor in part to Y, which was a combined group member during 2009, and also there is 100% continuity of ownership as between Y and N.

Example 4. Same facts as in example 2 (with X possessing an ITC carry forward from the unitary business activities of the XYZ combined group from tax year 2009), except that Z acquires 100% of the voting shares of a new taxpayer corporation, V, on January 1 of 2011. V is not engaged in a unitary business with X, Y or Z during 2011. However, the principal reporting corporation of the XYZ unitary group makes an affiliated group election for 2010. V is a manufacturing corporation within the meaning of G.L. c. 63, § 31A that would be entitled to claim ITC if it made a qualified acquisition thereunder. V has an income measure excise for tax year, 2011, of $4,000. X may not share any of its remaining ITC carry forward from tax year 2009 with V as V was not a part of the XYZ combined group in the tax year that the credit was generated.

(ii) Pre-2009 credits. In the case of a credit that was generated by a taxpayer for a taxable year beginning prior to January 1, 2009, a credit carry forward may be applied in a subsequent tax year consistent with the statutory rules that applied to such credits in the year the credit was generated. Consequently, in tax years beginning on or after January 1, 2009, such a credit carry forward may be shared by the taxpayer that generated the credit with one or more taxable members of its combined group *only if* such sharing is consistent with the statutory rules that applied to the credit in the year that the credit was generated. Thus, for example, in the case of a carry forward of a research credit generated by a taxable member of a combined group pursuant to G.L. c. 63, § 38M for a taxable year beginning prior to January 1, 2009, such carry forward may be applied against the excise due from one or more other members of the combined group if the credit relates to the group's unitary business and the other taxable members were entitled to share the credit under the combined group rules as previously in effect in Massachusetts in the tax year that the credit was generated (i.e., the corporations at issue had elected to and were filing on a combined basis under the predecessor version of G.L. 63, § 32B). In contrast, since a credit generated pursuant to G.L. c. 63, § 31A could not be shared by corporations in tax years beginning prior to January 1, 2009, a credit carry forward of a § 31A credit cannot be shared by combined group members in taxable years beginning on or after January 1, 2009.

Example 5. X, Y and Z are commonly owned taxpayer corporations taxable under G.L. c. 63, § 39 during the two year period 2008-2009. For taxable year 2008, X, Y and Z file as a combined group under the predecessor version of G.L. c. 63, § 32B, which has been repealed for taxable years beginning on or after January 1, 2009. X is a manufacturing corporation within the meaning of G.L. c. 63, § 31A and has an ITC carry forward from

2008 of $10,000. Y is a research and development corporation within the meaning of § 31A and has a research credit carry forward from 2008 of $20,000. Z is a corporation that is not referenced within the meaning of § 31A and would not be able to claim the ITC under that section even it acquired property as referenced therein. In 2009, the three corporations are engaged in a unitary business within the meaning of current G.L. c. 63, § 32B, and have an income measure excise as determined under G.L. c. 63, § 39, before the application of any credits, of $10,000, $20,000 and $10,000, respectively. The credits for the group are determined as follows.

Tax year 2009

Entity	Excise	'08 credit carry forward	Own credit used	Shared from X	Shared from Y	Excise post credits	Carry forward credit
X	$10,000	$10,000	$ 5,000	n/a	$ 1,875	$ 456	$ 5,000
Y	$20,000	$20,000	$ 18,125	n/a	n/a	$ 1,875	$ -
Z	$10,000	n/a	n/a	n/a	n/a	$ 10,000	$ -

X must use its ITC first and can offset 50% of its excise with its ITC. Therefore X uses $5,000 of its ITC. Y must use its research credit first against its own excise. Y's research credit limitation is $18,125 so it must use this amount first. (Y's research limitation is $12,500 plus $5,625. Since Y's liability is 50% of the group's liability Y is allocated 50% of the $25,000 credit limitation or $12,500 plus 75% of the excise remaining in excess of the $12,500 limitation or 75% of $7,500). Y's research credit can be shared with X since both X and Y, as combined group members under former § 32B, were able to share the credit during the tax year that it was generated, 2008, and also in 2009 both X and Z are members of Y's combined group and are both corporations taxable under § 39. Therefore**,** X can share in Y's remaining research credit of $1,875. However, X may not share any of its remaining ITC generated in 2008 with either Y or Z, as during tax year 2008 the § 31A credit could only be used by the corporation that generated it. Z does not take any credit in this example, but had X not used any of Y's research credit Z could have claimed it. Alternatively, X and Z could have each taken a portion of Y's excess research credit. X has a carryover ITC of $5,000.

(d) Ownership of a credit; situation where credit owner leaves combined group. Although a credit and a credit carry forward may sometimes be shared amongst the taxable members of a combined group as discussed above, the credit nonetheless remains the property of the taxpayer that initially generated the credit. Consequently, in any case in which a taxable member of a combined group ceases to be a member of the combined group, for whatever reason, any credit carry forward owned by such taxpayer is no longer available for use by the other taxable members of the combined group with which the taxpayer was previously affiliated. In such cases, if the taxpayer becomes a member of a new combined group, the taxpayer may not share the credit with the taxable members of its new combined group unless one of the taxable members of the new combined group was also a member of the taxpayer's combined group during the year that the credit was

generated and all the other requirements set forth in this section are met. Where a taxpayer that has a credit carry forward becomes a member of a new combined group, the change of ownership rules set forth in IRC § 383 as applied under Massachusetts law may apply, though any amount of credit carry forward that cannot be applied because of these limitations may be carried forward consistent with the rules and limitations discussed above. In the event that a member of a combined group has a credit carry forward and subsequently takes part in a merger or consolidation the credit carry forward will be lost if, for example, the member liquidates or terminates as a result of the merger or consolidation. *See id.*

Example 6. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of G.L. c. 63, § 31A. Y is a research and development corporation within the meaning of § 31A that would be entitled to ITC if it made a qualified acquisition thereunder. Z is a corporation that is referenced within the meaning of § 31A that would have been able to claim the ITC under that section if it acquired property as referenced therein. X has an ITC carry forward from tax year 2009 that it can carry forward to 2010. In tax year 2010 all of the stock of X is sold to taxpayer corporation N. X is engaged in a unitary business with corporation N in tax year 2010 (although it is presumed under 830 CMR 63.32B.1(3)(b) that X is not engaged in a unitary business with N, assume that the presumption is rebutted). X has $5,000 of ITC carry forward, which derived from a credit that it generated in 2009. N, like X, is a manufacturing corporation within the meaning of G.L. c. 63, § 31A that would be entitled to claim a credit thereunder. In 2010, X and N have an income measure excise as determined under G.L. c. 63, § 39, before the application of any credits, of $5,000 and $5000, respectively. N does not generate any credit in 2010 and has no credit carry forward. X may apply $2,500 of its ITC credit carry forward against its $5,000 2010 excise and reduce that excise to $2,500 (i.e., by 50%). X may not share its remaining $2,500 of ITC carry forward with N, as it was not engaged in a unitary business with N at the time that it generated the ITC. Also, as X is no longer a member of a unitary group with Y and Z and departed that unitary group with its ITC credit carry forward, neither Y nor Z can use the credit carry forward that belongs to X in tax year 2010.

Tax year 2010

Entity	Excise	Carry forward	Own credit used	Shared from X	Shared from Y	Excise post credits	Carry forward credit
X	$ 5,000	$ 5,000	$ 2,500	n/a	$ 2,500	$ 2,500	$ 2,500
N	$ 5,000	n/a	n/a	n/a	n/a	$ 5,000	-

Example 7. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of G.L. c. 63, § 31A. Y is not a corporation that would be entitled to ITC if it made a qualified acquisition thereunder. X has an ITC carry forward from tax year 2009 that it can carry forward to 2010. In tax year 2010 all of the stock of X and Y is sold to taxpayer corporation N, which is a member of a combined group with corporation O. X and Y are engaged in a

unitary business with corporations N and O in tax year 2010 (although it is presumed under 830 CMR 63.32B.1(3)(b) that X and Y are not engaged in a unitary business with N and O for the tax period after the acquisition, assume that this presumption is rebutted). N and O were engaged in a unitary business in tax year 2009. N has an ITC carry forward in 2010 of $10,000 that derives from a credit that N generated in 2009, during which year O was also entitled to claim an ITC.

In 2010, N and O are manufacturing corporations and Y becomes a research and development corporation, all of whom are entitled to generate an ITC under § 31A. In 2010, X, Y, N and O have an income measure excise as determined under G.L. c. 63, § 39, before the application of any credits, of $5,000, $10,000, $5,000 and $10,000, respectively. X may apply $2,500 of its ITC credit carry forward against its $5,000 excise and reduce that excise to $2,500 (i.e., by 50%). X may also share its remaining $2,500 of ITC carry forward with Y, as it was engaged in a unitary business with Y in 2009 when it generated this credit and Y is a corporation that is entitled to claim an ITC in tax year 2010. N may apply $2,500 of its ITC credit carry forward against its $5,000 excise and reduce that excise to $2,500 (i.e., by 50%). N may also share $5,000 of its remaining $7,500 of ITC with O, as N was engaged in a unitary business with O in 2009 when it generated this credit and O is a corporation that is entitled to claim an ITC in tax year 2010. Y may apply the $2,500 ITC carry forward that it receives from X to reduce it excise to $7,500. O may apply the $5,000 carry forward that it receives from N to reduce its excise to $5,000. N has $2,500 of ITC to carry forward to 2011.

Tax year 2010

Entity	Excise	Carry forward	Own credit used	Shared from X	Shared from N	Excise post credits	Carry forward credit
X	$ 5,000	$ 5,000	$ 2,500	n/a	n/a	$ 2,500	$ -
Y	$ 10,000	n/a	n/a	$2,500	n/a	$ 7,500	$ -
N	$ 5,000	$10,000	$ 2,500	n/a	n/a	$ 2,500	$ 2,500
O	$ 10,000	n/a	n/a	n/a	$5,000	$ 5,000	$ -

(e) Investment tax credit recapture; recapture in general. Where a taxpayer generates a credit pursuant to G.L. c. 63, § 31A for a taxable year beginning on or after January 1, 2009, and then subsequently disposes of the property, or where the property otherwise ceases to be in qualified use within the meaning of § 31A, recapture of the credit shall be determined pursuant to § 31A based upon the total credit previously taken by the taxpayer and its combined group members. This rule applies even if the taxpayer first leaves the combined group, then in a subsequent year disposes of the qualified property or otherwise causes recapture, and therefore in such subsequent tax year is no longer included in a combined group with the corporations whose use of the credit must be considered for purposes of recapture. Where a taxpayer generates a credit pursuant to G.L. c. 63, § 31A for a taxable year beginning on or after January 1, 2009, there shall be no recapture if the taxpayer subsequently transfers the qualified property to another taxable member of its combined group with which the credit could be shared under the rules in this section. However, in this case, if the transferee subsequently transfers the

property outside the combined group or to a member of the combined group with which the credit cannot be shared under the rules in this section, there shall be recapture of the credit on the part of the taxpayer that generated the credit determined pursuant to § 31A based upon the total credit previously taken by the combined group members. In any other case where a Massachusetts credit that is subject to recapture can be shared amongst combined group members, the recapture shall be evaluated in a similar manner.

Example 8. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of G.L. c. 63, § 31A. Y and Z are a research and development corporation and manufacturing corporation, respectively, within the meaning of § 31A that would be entitled to ITC if they made qualified acquisition thereunder. Midway through tax year 2009, on July 1st, X purchases one piece of equipment with a five year life to be used in the XYZ unitary business that generates $15,000 of ITC. During tax year 2010, X transfers the qualified equipment that generated the ITC to Z. No recapture is required on this transfer of the equipment from X to Z as Z is a manufacturing corporation within the meaning of § 31A that would be entitled to ITC if it made a qualified acquisition, etc., thereunder. In tax years 2009 and 2010, corporations X, Y and Z each use annually $2,500 of the ITC belonging to X consistent with the requirements for claiming ITC, such that all of the $15,000 of ITC has been claimed. On June 30, 2011, Z sells the equipment that generated the ITC to an unrelated corporation. X is required to recapture 3/5's of the ITC previously taken by X, Y and Z, or $9,000.

Example 9. X, Y and Z are taxpayer corporations engaged in a unitary business in tax year 2009. X is a manufacturing corporation within the meaning of G.L. c. 63, § 31A. Y and Z are a research and development corporation and manufacturing corporation, respectively, within the meaning of § 31A that would be entitled to ITC if they made qualified acquisition thereunder. Midway through tax year 2009, on July 1st, X purchases one piece of equipment with a five year life to be used in the XYZ unitary business that generates $15,000 of ITC. In tax year 2009, corporations X, Y and Z use $7,500 of the ITC generated by X, leaving X with a $7,500 credit carry forward. On January 1, 2010, all of the shares of X are acquired by an unrelated corporation, N, and therefore X is no longer engaged in a unitary business with X and Y. Corporation X is not permitted to share its ITC carry forward with the acquiring corporation N, but nonetheless uses the remaining $7,500 of this carry forward itself in 2010. On June 30, 2011, X sells the equipment that generated the ITC to N. X is required to recapture 3/5's of the ITC previously taken by X, Y and Z, or $9,000.

(10) Affiliated group election.

(a) General. A taxpayer member of a combined group may elect for such year to treat as its combined group all corporations that are members of its Massachusetts affiliated group that are subject to tax, or that would be subject to tax, if doing business in the commonwealth under G.L. § 2, 2B, 32D, 39 or 52A. The election does not require the Commissioner's consent. If a taxpayer makes an affiliated group election, all of the corporations that are members of its Massachusetts affiliated group shall be treated as the

members of a single Massachusetts combined group hereunder irrespective as to, for example whether: (1) these corporations are included in more than one federal consolidated return filed by more than one federal consolidated group or (2) these corporations are engaged in one or more unitary businesses. Upon making the election, the Massachusetts affiliated group shall calculate its combined group taxable income and the taxable income to be apportioned to the members of the combined group in accordance with 830 CMR 63.32B.1(6) and (7), provided that all income of all group members shall be treated as apportionable income for purposes of returns filed pursuant to the affiliated group election, irrespective as to, for example, whether such income would be allocable to a particular state in the absence of an election under this section.

(b) Water's edge aspect; relationship to worldwide election. An affiliate group election determines a taxpayer's apportionable net income derived from the activities of a combined group on a water's edge basis. Therefore, a taxpayer may not make an affiliated group election and a worldwide election for the same taxable year and may not make an affiliated group election for any tax year in which a worldwide election is in effect.

(c) Relationship to federal consolidated election. The membership of a combined group as determined pursuant to an affiliated group election is not limited to those corporations that are members of an affiliated group under Code § 1504, i.e., generally those corporations participating in the filing of a federal consolidated return. The affiliated group election shall include any corporation participating in the filing of a federal consolidated return, but the Massachusetts affiliated group is broader in several respects. For example, a Massachusetts affiliated group shall include a corporation that meets either of the two following standards even though such corporations would not be included in a federal consolidated return: (1) any corporation regardless of the place incorporated or formed, if the average of the corporation's property, payroll, and sales factors within the United States is 20 per cent or more, or (2) any corporation that earns more than 20 per cent of its income, directly or indirectly, from intangible property or service-related activities the costs of which generally are deductible for federal income tax purposes, whether currently or over a period of time, against the business income of other members of the group, but only to the extent of that income and the apportionment factors related thereto. Also, the Massachusetts affiliated group shall be determined by including all corporations that are related by common ownership applying the common ownership test described herein (i.e., direct or indirect ownership of more than 50% of voting control), rather than applying the standard applicable for federal consolidated return purposes that looks to 80% control of certain stock by vote and value. Further, control of members of the Massachusetts affiliated group may be direct or indirect, and a common owner or owners may be corporate or non-corporate. For example, two or more federal consolidated groups would be combined in one Massachusetts affiliated group filing if both consolidated groups were commonly owned by a non-US corporation.

(d) Mechanics for making the election. An affiliated group election shall be made by a taxable member of a combined group or, where the combined group has previously filed a combined return in Massachusetts, by the principal reporting corporation of such

combined group for the previous tax year. The election shall be made on an original, timely filed return or as otherwise required in writing by the Commissioner. A return shall be considered timely if it is filed by the taxpayer on or before the earliest due date or extended due date for the filing of the taxpayer's return under chapter 63. No return filed after this date, whether filed with an application for abatement or otherwise, shall constitute a valid affiliated group election. The election, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the Massachusetts affiliated group has agreed to be bound by such election.

(e) Effect of election in subsequent tax years. An affiliated group election shall be binding for and applicable to the taxable year for which it is made and for the next 9 taxable years. The election shall continue in place irrespective as whether a federal consolidated group to which the combined group belongs discontinues the filing of a federal consolidated return. Any corporation that enters a Massachusetts affiliated group during the time that the affiliated group election is in effect shall be included in the Massachusetts combined group beginning with the first group's tax reporting period after the corporation enters the group, and shall be considered to have consented to the application of the election and to have waived any objection to its inclusion in the combined group.

(f) Revocation, renewal of election. An affiliated group election, once made, cannot be revoked for 10 taxable years. When an election is made it may be renewed after 10 years for another 10 taxable years, provided however that in the case of a revocation a new election shall not be permitted in any of the three taxable years immediately following the revocation. The revocation or renewal of an election shall be made on an original, timely filed return by the principal reporting corporation of the Massachusetts affiliated group or as otherwise required in writing by the Commissioner. A revocation or a renewal shall be for the first taxable year after the completion of a 10-year period in which an election was in place. Any revocation or renewal, to be valid, must indicate in the manner required by the Commissioner that every corporation that is a member of the Massachusetts affiliated group has agreed to be bound by such revocation or renewal. If a prior affiliated group election is neither affirmatively revoked nor renewed after 10 taxable years pursuant to the terms of this section, the election shall terminate for the subsequent taxable year and no affiliated group election shall apply for that year and the subsequent two taxable years. In such cases, the affiliated group may make a new election for a 10 year period commencing with the fourth taxable year after the termination on the terms set forth herein.

(g) **Agreement to provide documents.** An election under this section shall constitute consent to the production of documents or other information that the Commissioner reasonably requires, for example, for purposes of verifying the appropriate members of the group, that the requirements of the affiliated group election have been met, that the tax computations and tax reporting are proper, etc.

(11) Liability; principal reporting corporation.

(a) Liability. Every taxable member of a combined group, including a Massachusetts affiliated group treated as a combined group hereunder, shall be jointly and severally liable for any tax due from any member of the combined group subject to tax under chapter 63, including any interest, additions to tax, and penalties, to the extent permitted under the constitution of the United States. An assessment against any taxable member of a combined group for the excise attributable to the group's income in a particular taxable year, including any interest, additions to tax, or penalties, shall be deemed to constitute an assessment against all taxable members of the combined group for that year.

(b) Principal reporting corporation. In the event that there are two or more taxable members of a combined group, such members of the combined group shall designate one taxable member to serve as the principal reporting corporation, which will then report the income of the combined group in the form and manner prescribed by the Commissioner. The principal reporting corporation shall be the taxable member of the combined group that is either the combined group's common parent corporation or where there is no such common parent corporation or this parent corporation is not a taxable member of the combined group, the taxable member of the combined group that the group reasonably expects will have the largest amount of Massachusetts taxable net income on a recurring basis. The principal reporting corporation agrees to act as the agent on behalf of the taxable members of the combined group for all tax matters relating to the combined group, including assessments, requesting extensions of time to file returns; making, renewing or revoking an election such as an affiliated group election or worldwide election; filing a refund claim, accepting of refunds or notices; and providing access to tax and other relevant records of the non-taxable members of the combined group as reasonably requested by the Commissioner. In the case of a request for an extension of time to file returns, such request shall be treated as such a request for both the combined group's income measure and each individual group member's non-income measure return.

(12) Taxable year; fiscalization

(a) Taxable year. The combined group's taxable year is determined as follows: (a) if two or more members of the group file a federal consolidated return, the group's taxable year is the taxable year of the federal consolidated group; and (b) in all other cases, the group's taxable year shall be the taxable year of the principal reporting corporation.

(b) Fiscalization

1. General. If the taxable year of one or more members of a combined group does not begin or end on the same dates as the taxable year of the principal reporting corporation those members' accounting periods must be adjusted in order for the appropriate share of the combined group's unitary business income or affiliated group income, as the case may be, to be properly attributed to those members' taxable years.

2. Calculating members' share of combined group income for principle reporting corporation's tax year. Each member of the combined group should generally determine the group's income and apportionment data from its books of account earned during the taxable year of the principal reporting corporation. This will require an interim closing of the books for members whose taxable year differs from that of the principal reporting corporation. However, a pro rata method of converting income to the principal reporting corporation's taxable year will be accepted, provided the method does not produce a material misstatement of income apportioned to Massachusetts. Unless otherwise permitted or required by the Commissioner, the treatment of both the income and the apportionment data of any particular member must use the same method. If one method was used to account for a member's income and apportionment data in the preceding taxable year and another method will be used in the combined report for the current taxable year, adjustments to income and apportionment data of the member shall be made to prevent income and apportionment data from being omitted or duplicated.

(a) Interim closing method. The unitary business or affiliated group income or loss attributable to a member of a combined group is determined by first calculating the income or loss from the books and records of the member for the two periods that together encompass the principal reporting corporation's single taxable year. For example, if the principal reporting corporation has a taxable year ending on December 31, 2009, and another member has a taxable year ended March 31, 2010, the other member determines its income from its books and records for the partial accounting periods beginning January 1, 2009 and ending March 31, 2009, and from April 1, 2009 and ending December 31, 2009. The apportionment data shall also be determined by reference to the member's books and records for the appropriate partial taxable year provided, however, in the case of the property factor, the factor is required to be determined using monthly weighted averaging as described in 830 CMR 63.38.1(7)(e)3. *See* 830 CMR 63.38.1(7)(e)3. Interim income and apportionment data from the respective partial tax years is then combined with the income and apportionment data of the taxable year of the principal reporting corporation, along with the income and apportionment data of other members of the combined group for the same period, and the members' share of the combined group's taxable income for the principal reporting corporation's tax year is computed.

(b) Pro rata method.

(i) At the election of the members of a combined group made by the principal reporting corporation, fiscalization of unitary business income or affiliated group income of one or more members of the combined group to the taxable year of the principal reporting corporation may be determined by use of a pro rata method. However, this election is not available if the

Commissioner determines that this method produces a material misstatement of income. Under the pro rata method, the income and apportionment data of the member as adjusted to reflect the determination of income under state law is assigned to the respective portion of the principal reporting corporation's taxable year based on the ratio of months in common with the tax year of the principal reporting corporation. For example, if the principal reporting corporation's taxable year ends on December 31, 2009, a member whose income year ends on March 31 will include 3/12ths of its adjusted separate income and its payroll and sales for its taxable year ended March 31, 2009 in the December 31, 2009 taxable year of the principal reporting corporation. That member will then also include 9/12ths of its adjusted separate income and its payroll and sales for its taxable year ended March 31, 2010 in the December 31, 2009 taxable year of the principal reporting corporation. The property factor is required to be determined using monthly weighted averaging as described in 830 CMR 63.38.1(7)(e)3. Therefore, the property factor data used for the member whose attributes are being fiscalized will be the pro rata portion of the member's property numerator and denominator values for its respective separate taxable years, reflecting beginning and ending average property values for those separate taxable years.

(ii) The income and apportionment data from the member's recomputed taxable years is then combined with the income and apportionment data of the taxable year of the principal reporting corporation, along with the income and apportionment data of other members of the combined group for the same period, similarly recomputed if necessary. The combined group's taxable income is then apportioned to each of the taxable members of the combined group.

(iii) In the event that the pro rata method requires the determination of income and apportionment data of a corporation whose taxable year has not yet closed, and the information cannot be obtained in time for the other members to file an accurate return, the income and apportionment data for that period shall be estimated based on available information. If the use of actual income and apportionment data results in a material change in the tax liabilities of the taxable members of the combined group, the taxable members must file an amended return to reflect the change.

3. Attributing a member's share of combined group income from principal reporting corporation's tax year to members' tax years. After determining the combined group's taxable income apportioned to Massachusetts of a taxable member that is not filing its return with respect to that same taxable year, that income is then proportionately assigned to the applicable portion of that member's taxable year, based on the number of months falling within the common taxable period of the principal reporting corporation. For example, if the principal reporting corporation's taxable year ends on December 31, 2010, a taxable

member whose taxable year ends on March 31 will reflect 3/12ths of its share of apportioned income from the principal reporting corporation's December 31, 2010 taxable year in its taxable year ended March 31, 2010, and 9/12ths of its share of such income in its income year ended March 31, 2011. The resulting income from such segments is then aggregated (or netted) for the member's taxable year to determine that member's unitary business income or affiliated group income from Massachusetts sources attributable to the combined group.

(13) No limitation on other authority. Nothing in this regulation shall be construed to limit or negate the Commissioner's authority to make adjustments as otherwise permitted under Massachusetts law, including under G.L. c. 63, § 31I, 31J or 31K; G.L. c. 63, § 39A; and G.L. c. 62C, § 3A. However, he provisions of G.L. c. 63, §31I, 31J and 31K shall not apply to transactions between corporations that are members of the same combined group to the extent such transactions are deferred or eliminated under this regulation. Therefore, in any case in which an affiliated group election has not been made, these provisions do apply as to transactions between corporations that, although under common ownership, are each a member of a separate combined group or as to transactions between corporations that are otherwise filing on a combined basis when the transaction does not relate to the unitary business.

(14) Effective Date. This regulation shall apply to taxable years beginning on or after January 1, 2009.